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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 731

UNITED GAS PIPE LINE COMPANY,
Petitioner,
v.
IDEAL CEMENT COMPANY,
Respondent.

No.

UNITED GAS PIPE LINE COMPANY,
Petitioner,
v.
SCOTT PAPER COMPANY,
Respondent.

PETITIONS FOR WRITS OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITIONS FOR WRITS OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that writs of certiorari be issued to review the judgments of the United States Court of Appeals for the Fifth Circuit reversing the judgments of the United States District Court for the Southern District of Alabama. As permitted by paragraph 5 of Rule 23, a single petition is submitted as these two cases were decided by the same Court below and involve identical questions.

Opinions Below

The opinion of the District Court dated September 25, 1959, is reported at 176 F.Supp. 748, and appears at pages 81-96 of the record in the Scott Paper Company case and pages 86-100 of the Ideal Cement Company record.

The opinion of the Court of Appeals dated September 2, 1960, is reported at 282 F.2d 574 and its opinion of October 5, 1960, denying the first petition for rehearing is reported at 282 F.2d 580. The opinion of the Court of Appeals of November 16, 1960, clarifying its earlier opinions and denying the second petition for rehearing is reported at 282 F.2d 580. Copies of all opinions of the Court of Appeals are appended.

Jurisdiction

The judgment of the Court of Appeals in each of these cases was first dated September 2, 1960, and thereafter entered on November 16, 1960.

The first petition for rehearing was denied by an opinion and order dated October 5, 1960. The second petition for rehearing was denied by a clarifying opinion and order dated November 16, 1960, and this is the effective date of each judgment. (See order of Court of Appeals of December 27, 1960, in supplemental transcript.)

Jurisdiction is conferred on this Court to review the judgment in each case by writ of certiorari by Title 28, Section 1254, of the United States Code.

Questions Presented

(1) Does the commerce clause of the Federal Constitution immunize an interstate pipe line company making direct sales of gas to industrial consumers in the City of Mobile from a city license tax on the privilege of conducting that business in the City?

(2) Is a license tax on the privilege of selling natural gas the equivalent of a tax on the preceding interstate delivery or transportation of the gas?

Constitutional Provision and Ordinance Involved

The commerce clause of the Federal Constitution, Clause 3 of Section 8, Article I, is as follows:

> "The Congress shall have power
>
> * * * * * * * *
>
> to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

The pertinent portions of the license code of the City of Mobile are the clause levying annual license taxes and paragraph 193 of the schedule, as follows:

> "And each and every person, firm, company, association, partnership, agency or corporation, wherever located, engaging in or carrying on or doing any act or thing herein specified, in or from the City of Mobile, Alabama, shall pay to the City of Mobile an annual license therefor as follows, to-wit:
>
> * * * * * * *
>
> "193. GAS COMPANIES: Each person, firm or corporation engaged in the business of selling or distributing natural gas, in an amount equal to 3% of the gross receipts for the business transacted by such person, firm or corporation, in the City of Mobile for the preceding year from the sale of such natural gas sold or distributed from any point or points in the City of Mobile by such person, firm or corporation for any purpose whatsoever.

"The provisions of the above paragraph to be applied to operation in the Police Jurisdiction on the basis of 1½% of said gross receipts."

Other provisions of the City License Code, which in our view were erroneously considered by the Court of Appeals, are set forth in the original opinion of September 2, 1960, which is appended.

Statement of the Case

The basic issue in these cases is whether an interstate pipe line company may enjoy the protection and benefits of municipal government in making direct sales of gas to industrial consumers in a city and yet escape a municipal license tax on such privilege by reason of the commerce clause.

These cases originated as suits by the petitioner, United Gas Pipe Line Company, (sometimes referred to as "United"), against respondents, two of its industrial customers, for contractual reimbursement of taxes paid by United to the City of Mobile. The city levies an annual license tax on the business of selling or distributing natural gas measured by gross receipts from sales in the preceding year (3% of sales in the city and 1½% of sales in the adjoining police jurisdiction).

The respondents "Ideal" and "Scott" defended on the ground that their reimbursement obligation is limited to taxes validly imposed and that the application of the license tax to sales by United to industrial consumers located within the City of Mobile (or its police jurisdiction) offends the commerce clause of the Federal Constitution. Petitioner (United) was thus forced into the unique position of contending for, instead of against, the validity of a heavy tax levied upon it.

In the District Court both sides moved for a summary judgment in both cases. The motions of United were granted and final judgments were entered against Ideal and Scott on September 25, 1959, awarding full reimbursement. The Court of Appeals reversed.

The sole issue is whether the Mobile license tax is a tax directly on the flow of interstate commerce. Ideal and Scott admit their contractual obligation to reimburse United if the license tax itself is valid. There is no claim that the tax is discriminatory against interstate commerce, or unfairly apportioned, or unreasonable in amount, or beyond the charter power of the City of Mobile.

United is an interstate pipe line company. The gas it sells to Ideal and Scott in Mobile is brought into Alabama from nearby states through United's own transmission lines. Delivery from a point near the city limits to the individual plant sites in the city or its police jurisdiction is accomplished through the distribution lines of the local independent gas company, the same lines that supply industrial, commercial and domestic consumers who purchase from this local distributor. Ideal and Scott have no gas storage facilities. The gas is consumed as it is delivered and each customer therefore determines the quantity it purchases by its rate of consumption at the point of delivery. Until then the gas has been an unidentifiable part of the great volume of gas in the transmission lines of United and the distribution lines of the local gas company and just as readily could have gone to any one or more of the thousands of industrial, commercial and domestic consumers in the city and its police jurisdiction supplied through the same lines. Had the gas reached any of these other customers the license tax would have applied to the sale, but the Court of Appeals has placed the sales to Ideal and Scott (and to the five other industrial

consumers to whom United sells directly) beyond the reach of the tax.

The contracts between United and the two respondents specifically require that the gas be delivered to their respective plant sites in Mobile. (Ideal R 52; Scott R 42) Also, United is required to meter the gas and regulate its flow at the plant sites and the contracts grant United easements with right of ingress and egress for the performance of these local acts. (Ideal R 43, 52; Scott R 33, 42) The records of sales and deliveries are maintained at the office of United's agent in Mobile; the customers are billed from that office and payments for the gas made to that office. (Ideal R 33; Scott R 22)

Taking advantage of the distribution lines of the local gas company, Mobile Gas Service Corporation, United contracted with it to make the within-the-city deliveries to the plant sites of Ideal and Scott (and the five other direct purchasers from United). United's contract with Mobile Gas Service Corporation also engages the latter, as agent for United, to meter the gas at its point of delivery at respondents' plant sites in the city, and to prepare and send out the bills and collect the accounts from these industrial consumers, all at its office in the City of Mobile. (Ideal R 62-80; Scott R 57-75) United compensates Mobile Gas Service Corporation for all of these services at the rate of 2¢ per thousand cubic feet of gas sold to the industrial consumers.

In practice Mobile Gas Service Corporation collects United's entire bill from the industrial consumer, deducts its compensation and remits the balance to United. Stated simply, United charged Ideal and Scott approximately 23¢ per thousand cubic feet for the gas they consumed in the period in question. United's agent, Mobile Gas Service Corporation, collected the full sales price from Ideal and

Scott, retained 2¢ per thousand cubic feet as its compensation and remitted 21¢ to United.

Mobile Gas Service Corporation included its 2¢ per Mcf. in its gross receipts upon which its Mobile license tax was computed, but was reimbursed the amount of the resulting tax by United pursuant to their contract. United in turn is entitled under its contracts with Ideal and Scott to recover the amounts so reimbursed to Mobile Gas Service Corporation as well as the taxes United paid direct to the City of Mobile on the 21¢ per Mcf. it received. In denying the second petition for rehearing the Court of Appeals reached the strange and, we submit, unsupportable conclusion that the tax is valid as to the 2¢ per Mcf. of United's sales price retained as compensation by its agent but not the remaining 21¢ the agent remits to United.

The independent local distributor supplies all of the domestic, commercial and industrial users of gas in Mobile except Ideal and Scott and five other industrial consumers who purchase direct from United. The local distributor purchases its gas at wholesale from United and takes delivery into its distribution system at metering stations near the city limits. It pays United for all gas so received less the quantities consumed from its distribution system by Ideal and Scott and the other five direct purchasers from United. The City of Mobile makes no attempt to tax United's receipts from these sales to the distributor at wholesale but it collects this tax in full from the distributor when it in turn sells the same gas to its customers, the ultimate consumers. This is in keeping with the Natural Gas Act (15 U.S.C. § 717, *et seq.*) which places interstate sales at wholesale to a distributor (but not direct sales to consumers) beyond the reach of state and local taxation and regulation.

It is the position of United that direct sales of natural

gas to industrial consumers by interstate pipe line companies consummated within a city are sufficiently local in aspect that a city may require a license tax of the pipe line company, measured by its gross receipts from such sales, without offending the commerce clause. It is important not merely to United but also the City of Mobile and to municipalities generally, and to the natural gas industry, that this question of taxation be settled by this Court.

Collateral and, we submit, irrelevant questions arose in the Court of Appeals. Some were precipitated by language employed in the first opinion of that Court from which it receded in part in the subsequent opinions denying two petitions for rehearing. An excursion into these questions appears to be unnecessary and might tend to obscure the clear-cut question of the validity *vel non* of a city license tax on the privilege of making direct sales to industrial consumers within the city.

Involved here are the license taxes for 1956, 1957 and 1958 United paid direct to the City of Mobile on sales to Ideal and Scott. Ideal is located in the city itself where the 3% tax applies. Scott is in the adjoining police jurisdiction of the city where the tax rate is 1½%.

Jurisdiction of the District Court was invoked on the basis of diversity of citizenship under Section 1332 of Title 28, United States Code.

Reasons for Granting the Writs

(1) The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, to-wit: The validity of a municipal license tax on interstate pipe line companies on the privilege or business of making direct sales of natural gas to industrial consumers situated within the municipal-

ity. This question is of considerable interest and concern to many municipalities and to a substantial segment of the natural gas industry.

(2) This Court has not passed specifically on the validity of this type of municipal license tax. However, the Court of Appeals, in striking down the Mobile Tax, has reached a result in conflict with decisions of this Court in other pipe line cases holding that direct sales to industrial consumers are sufficiently local in character to support state regulation and taxation. Considerable uncertainty and confusion in this important area of state and local taxation is likely to result from the opinion of the Court of Appeals which should be settled.

Argument

On principle, if sales of natural gas may be taxed by the states without infringement of the commerce clause, such sales should also be taxable by municipalities. Yet the Court of Appeals has ignored, without any explanation or distinction, applicable decisions of this Court upholding state taxation and regulation of direct sales by interstate pipe line companies. The thread of these decisions is summarized in one of the opinions as follows:

> "This Court has often had occasion to rule that the retail sale of gas at the burner tips *by one who pipes the gas into the state*, or by a local distributor acquiring the gas from another who has similarly brought it into the state, is subject to state taxation and regulation." (Citing cases)
>
> *Memphis Gas Co.* v. *Beeler*, 315 U.S. 649, 653 (1942). (Emphasis supplied)

One of the early cases is *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U.S. 23 (1920). There it was held

that the transmission and sale of natural gas by a pipeline company from the producing state to consumers in another state is interstate commerce but subject to regulation by the state of the consumers because of the local nature of the direct sales to them. The Court said:

> "The thing which the State Commission has undertaken to regulate, while part of an interstate transmission, *is local in its nature*, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to *factories* and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city." (Emphasis supplied) 252 U.S. at 30-31.

In a note to its opinion in a later case the Court cast aside any suggestion that because an industrial consumer purchases large quantities of gas, sales to it should fall in the "wholesale" category beyond the reach of state regulation:

> "Appellant contends that 'wholesale', *i.e.*, large quantity, service direct to industrial consumers, as exemplified by its sales to Anchor-Hocking, is to be distinguished from the sales in *Pennsylvania Gas Co. v. Public Service Comm'n*, 252 U.S. 23, which were made in a manner commonly associated with a local

distribution system supplying gas to consumers in a city. Nothing in the decision, however, requires it to be so limited. On the contrary, emphasis may rather be placed on the fact that both situations involve sales to ultimate consumers, Anchor Hocking being just as clearly in that category as the 'factories and residences' served by the company in the *Pennsylvania Gas Co.* case. See *Illinois Gas Co.* v. *Public Service Co.*, 314 U.S. 498, 505, where Chief Justice Stone, in summarizing the *Pennsylvania Gas Co.* case, stated that it involved gas 'sold directly to ultimate local consumers';"

Panhandle Eastern Pipe Line Co. v. *Public Service Commission*, 332 U.S. 507, 515, n. 10 (1947).

Another early case dealt with the right of a state to levy an occupational tax on a pipe line company located entirely within the state but selling and delivering gas in continuous interstate flow through connecting pipe lines. This Court held:

"The amounts were calculated on gross receipts derived wholly from appellant's intrastate business notwithstanding the gas used had moved in interstate commerce."

East Ohio Gas Co. v. *Tax Commission*, 283 U.S. 465, 472 (1931).

While *East Ohio*, just discussed, classified direct sales as intrastate in seeming conflict with *Pennsylvania Gas Co.* v. *Public Service Commission*, *supra*, the two cases reached the same result. Both upheld state taxation or regulation and that result has been adhered to in all the subsequent cases. It is now well established that such sales, although

a part of interstate commerce, are nevertheless sufficiently local in aspect to support state regulation and taxation.

> *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507 (1947).

In the case just cited the Court pointed out that its decisions prior to the adoption of the Natural Gas Act (15 U.S.C. § 717, *et seq.*) had upheld state regulation of direct sales to local consumers and that Congress by adoption of that act had given legislative sanction to such regulation. The Natural Gas Act, like the decisions of this Court preceding it, placed the sale of natural gas for resale under federal regulation, but the act is careful to exclude from such regulation, and thereby leave subject to state regulation, direct sales to consumers.

> "Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach. That area did not include direct consumer sales, whether for industrial or other uses. Those sales had been regulated by the states and the regulation had been repeatedly sustained. In no instance reaching this Court had it been stricken down."

> *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 519 (1947).

A similar line of demarcation was recognized by this Court in an electric power case wherein it cites the *Pennsylvania Gas* case, *supra:*

> "* * * the jurisdictional lines between local and national authority were not finally determined until this Court's opinion in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83. * * *

Attleboro reiterated and accepted the holding of *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23, that sales across the state line direct to consumers is a local matter within the authority of the agency of the importing state. * * *."

U.S. v. Public Utilities Commission, 345 U.S. 295, 303 (1953).

In a later "Panhandle case", *Panhandle Pipe Line Co. v. Michigan*, 341 U.S. 329 (1951), the pipe line company sought to escape state regulation of direct sales to large industrial customers, including Ford Motor Company, on the ground that such sales were interstate commerce and beyond state regulation because of the commerce clause. However, the Supreme Court upheld state regulation in the following language:

"The sale to industrial consumers as proposed by appellant is clearly interstate commerce. *Panhandle Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U.S. 507, 513; *Pennsylvania Gas Co. v. Commission*, 252 U.S. 23, 28. But the sale and distribution of gas to local consumers made by one engaged in interstate commerce is 'essentially local' in aspect and is subject to state regulation without infringement of the Commerce Clause of the Federal Constitution." 341 U.S. at 333.

. . . . . .

"It does not follow that because appellant is engaged in interstate commerce it is free from state regulation or free to manage essentially local aspects of its business as it pleases. The course of this Court's decisions recognizes no such license. *See Ohio Service* case, *supra*; *Panhandle Indiana* case, *supra*; *Pennsyl-*

rania Gas Co. v. Commission, 252 U.S. 23. "Such a course would not accomplish the effective dual regulation Congress intended, and would permit appellant to prejudice substantial local interests. This is not compelled by the Natural Gas Act or the Commerce Clause of the Constitution." 341 U.S. at 337.

The failure of the Court of Appeals to follow the foregoing cases is due to its own misconstruction of the taxing ordinance. Although the ordinance expressly taxes "the business of *selling or distributing* natural gas" the Court of Appeals has interpreted it to be a tax on the "privilege of making *deliveries*" instead of sales, and has held the delivery of the gas to be "an integral part of its movement in interstate commerce" instead of recognizing the local delivery as an element of the local sale. In its opinion of October 5, 1960, denying the first petition for rehearing the Court of Appeals construed its original opinion as follows:

> "We held that *delivery* of gas directly to industrial consumers in the City of Mobile *is an integral part of its movement in interstate commerce*, and that a tax on the *privilege of making deliveries* is a burden on interstate commerce." (Emphasis added) 282 F.2d at 580.

Because the tax ordinance is fortified by enforcement provisions, the Court of Appeals says the city has made "the procurement of a license a precondition of engaging in interstate commerce within its jurisdiction." (P. 30, Appendix A, opinion of September 2, 1960. See also page 27.) However, the tax is not on the right to transport

gas into or through the city. Vast quantities of gas are transported free of any city tax, either into the city for resale by the local distributor or enroute through the city's police jurisdiction to the Pensacola, Florida, area. The tax is not on the inter-state movement but on the local privilege of selling some of the gas in the City of Mobile at the end of the journey. As this privilege is taxable the city is entitled to reasonable means of enforcing the tax. We cannot imagine an effective tax without enforcement provisions.

The Court of Appeals has therefore dealt with the tax as if one on the act of transportation or delivery rather than on the act of selling. Its misconception of the tax is also apparent from the authorities on which it relies such as *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951), and *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954). Both of these cases involved common carriers engaged exclusively in transporting the property of others for hire and dealt with taxes levied on this transportation business. Here, however, United is not a common carrier and employs its pipe lines only for the transmission of its own gas. Moreover, the tax is not on the act of transporting the gas but on the privilege of selling it in the City of Mobile at the end of its interstate journey. United has the dual characteristics of carrier and vendor, but it owns the gas that it carries and the receipts on which it is taxed by the City of Mobile are from sales and not from transportation, even though transportation enhances the sales price here just as it does on any other transported commodity.

The enhancement of the sales price because of transportation was necessarily a part of the gross receipts from gas sales in *East Ohio Gas Co., supra*. Transportation

increased the sales price of the coal delivered direct to the consumer in *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 58 (1940), where this Court said:

> "Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity which, apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce."

Likewise, the interstate transportation was reflected in the gross receipts from the sale of goods brought into Indiana in *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340 (1944). This Court upheld "a privilege tax upon the receipt of gross income" on direct sales completed in the state in the following language:

> "We only hold that where a state seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such 'local activities or privileges' (*McGoldrick* v. *Berwind-White Co.*, *supra*, p. 58) are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage." 322 U.S. at 349.

So it is that the direct delivery by the seller to the purchaser-consumer within the local tax jurisdiction is itself a sufficient local activity to support a tax on the gross

receipts of the sale, whether as a sales tax or a privilege or license tax. The tax is on the privilege of making the local sale, not the interstate delivery. There can be no doubt but that the sales here are completed in the City of Mobile. Ideal and Scott have never contended to the contrary. The gas is delivered by the seller itself, United through its contractual agent, direct to the plant sites of Ideal and Scott in Mobile in accordance with their requirements. They purchase as they consume. The gas is metered at the plant sites by United's agent. Records are maintained and bills are sent out from an office in Mobile and Ideal and Scott pay for the gas at that office. Hence delivery and acceptance as well as payment, all of which are essential elements of a sale, take place within the City of Mobile. These local activities amply support this tax.

Conclusion

We respectfully submit that the Court of Appeals erred in equating a tax on the privilege of selling natural gas within the City of Mobile to a tax on the interstate delivery or transportation of the gas and, based on this erroneous equation, improperly invoked the commerce clause to invalidate the tax. For the reasons above set forth the petitioner prays that writs of certiorari be granted.

Respectfully submitted.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18103

IDEAL CEMENT COMPANY, *Appellant*,

versus

UNITED GAS PIPE LINE COMPANY, *Appellee*.

No. 18118

SCOTT PAPER COMPANY, *Appellant*,

versus

UNITED GAS PIPE LINE COMPANY, *Appellee*.

Appeals from the United States District Court for the Southern District of Alabama

(September 2, 1960)

Before RIVES, Chief Judge, and JONES and WISDOM, Circuit Judges

RIVES, Chief Judge: The issue in these cases is whether a municipal license tax is applicable to the business of distributing natural gas to industrial consumers within the municipality's taxing jurisdiction, when such distribution is the terminal act of the transportation of that natural gas from without the state. The tax is measured by gross receipts from sales of natural gas within the municipality's taxing jurisdiction.

The issue arises out of suits filed by the United Gas Pipeline Company against Ideal Cement Company and Scott Paper Company for reimbursement of such taxes paid by United on gas distributed to Ideal and Scott. Ideal and Scott defended on the ground that the tax reimburse-

ment articles[1] of their separate contracts with United did not obligate them to reimburse United for taxes not validly levied upon and paid by United, and that the tax could not validly be applied to gas distributions. Both Ideal and Scott assert that United's right to reimbursement fails entirely if the tax ordinance is found to be inapplicable. United's position is that, if the tax were held to be inapplicable, it would be obligated to credit Ideal and Scott with any amounts which United might recoup from the municipality. Thus the inapplicability of the tax would be either a complete or partial defense to United's actions.

If it appeared that United, on the one hand, and Ideal and Scott, on the other, were engaging in a friendly or simulated test, then the court should refuse to pass upon the applicability of the taxing ordinance.[2] When, however, as in this case, in pursuance of an honest and actually antagonistic assertion of rights and defenses by the one party against the other, there is presented a question in-

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[1] Each contract contains an article reading as follows:

"Tax Reimbursement. Buyer agrees to reimburse Seller for all taxes which may be levied upon and paid by Seller, or which Seller under contractual or legal obligation pays to the person or company on which such taxes are levied on or with respect to the gas delivered hereunder; provided, however, that no reimbursement shall be made to Seller under the provisions of this article for any taxes which were included in the weighted average price of gas under the provisions of the above Monthly Rate.

"The term 'taxes' as used herein shall mean any tax (other than ad valorem, income or excess profits taxes), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the gas itself or on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value or sales price of the gas in question; provided, however, that the term 'taxes' shall not be deemed to include any general franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the State as a foreign corporation."

[2] Ashwander v. Valley Authority, 1936, 297 U.S. 288, 318, 346; Steamship Co. v. Emigration Commissioners, 1885, 113 U.S. 33.

volving the applicability[3] of a municipal ordinance, then, even though the municipality has not intervened or been made a party, and will not be bound under principles of res judicata, the court must proceed to determine the question as between the parties to the suit.[4]

United is a Delaware corporation, which has its principal place of business in Louisiana. It maintains pipelines for the transmission of natural gas from Louisiana into Mississippi, Alabama and Florida. In Alabama United distributes directly to seven industrial consumers located in the City of Mobile and its police jurisdiction, including Ideal and Scott, and to a local distributor, Mobile Gas Service Corp., which in turn services domestic, commercial and industrial customers of its own.

United brings gas into the Mobile, Alabama area from Mississippi and Louisiana by three pipelines and these pipelines converge at a station owned by United near the City of Mobile. At this station, the pressure of the gas is reduced by United from that at which it entered the State of Alabama. From this station, United has four pipelines, one of which continues on to Pensacola, Florida. The remaining three lines go to three separate metering stations where the gas is either sold to Mobile Gas Service Corporation or delivered into its pipelines. United has contracted with Mobile Gas Service Corporation to handle the distribution and metering of the gas in the City of Mobile, even to United's own customers, and likewise to

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[3] No question of the total unconstitutionality of the Mobile ordinance is presented, since the ordinance contains a savings clause which reads as follows: "No provision of this Code shall be applied: (b) so as to impose any unlawful tax or unlawful burden on interstate commerce or on any activity of the State or Federal Governments . . ."

[4] See Chicago & Grand Trunk Railway Co. v. Wellman, 1892, 143 U.S. 339; Coffman v. Breeze Corporations, 1945, 323 U.S. 316; Casey Jones, Inc. v. Texas Textile Mills, 5 Cir., 1937, 87 F.2d 454, 456; Soloman Tobacco Co. v. Cohen, 1906, 184 N.Y. 308, 77 N.E. 257; Wayne County Produce Co. v. Duffy-Mott Co., Inc., 1927, 244 N.Y. 351, 155 N.E. 669.

handle the accounting and collecting of revenues of sale. As compensation to Mobile Gas Service Corporation for the services so provided, United pays it a certain percentage of the money United collects from the sale of gas.

On June 28, 1946, Ideal entered into a contract with Mobile Gas Service Corporation for the sale and purchase of natural gas. Mobile Gas Service Corporation assigned this contract to United on November 1, 1954, and United subsequently sold and delivered natural gas to Ideal directly under said contract until July 25, 1956, when the agreement expired. On July 17, 1956, United and Ideal entered into a contract for the sale and purchase of natural gas for a term commencing on July 26, 1956 and ending January 1, 1965, which contract is still in effect, and under this contract substantial quantities of natural gas have been sold and delivered by United to Ideal.

Under the first contract (June 28, 1946), Ideal agreed to pay Mobile Gas Service Corporation, as seller, for any "increased or new tax" which might be imposed on it as a result of "'the production, severance, gathering, transportation, handling, sale or delivery of gas, or upon the right or privilege to produce, sever, gather, transport, handle, sell, or deliver gas." The tax in question, if applicable, is such an "increased or new tax."

In the second contract, that is, the one which has been in force since July 26, 1956, Ideal agreed to reimburse United for all taxes which might be levied upon and paid by United, or which United under contractual or legal obligation might pay to another person or company on which such taxes were levied with respect to gas delivered under such contract to Ideal.

On July 21, 1955, Scott and United entered into a contract for the purchase and sale of natural gas, which is still in force, and which contains a tax reimbursement article heretofore quoted in footnote 1.

United paid the taxes at issue in this case to the City of Mobile for the years 1956, 1957 and 1958, and has paid to Mobile Gas amounts equal to the increased taxes paid by

Mobile Gas for deliveries to Ideal and Scott pursuant to United's contract with Mobile Gas. These taxes were assessed in 1956 and 1957, and are in addition to the taxes paid directly to the City of Mobile by United for these years.

United made demands on Ideal and Scott for reimbursement, which demands were refused, on the ground that such taxes were not reimbursable under the contracts; whereupon United filed these actions.

There is no genuine issue as to any of the material facts. Consequently each of the parties filed a motion for summary judgment. Rule 56, Federal Rules of Civil Procedure. The district court, after stating the facts in more detail, denied the motions of Scott and Ideal and granted United's motion.[5]

The Mobile License Ordinance reads, in pertinent part, as follows:

"AN ORDINANCE,

"To fix the rate of annual licenses in the City of Mobile and in the police jurisdiction thereof.

"BE IT ORDAINED by the Board of Commissioners of the City of Mobile as follows:

"SECTION 1: The following is hereby declared to be and is adopted as the schedule of licenses for the year beginning January 1, 1955, and ending December 31, 1955, and for each subsequent year:

"(1) For practicing, engaging in, carrying on or conducting any exhibition, trade, vocation, occupation or profession in the City of Mobile, Alabama;

"(2) *For keeping, engaging in or carrying on business of any nature*, offering merchandise for sale, soliciting orders, or *making deliveries of any merchandise*, rendering or giving or selling service of any kind, taking orders for merchandise to be subsequently delivered by any agency or means, or accepting payments on orders for merchandise to be delivered sub-

[5] Reported in 176 F.Supp. 748.

sequently by any agency or means, any or all of which acts or transactions are done in or from the City of Mobile, Alabama;

"(3) *For entering the City of Mobile to do business*, to make sales, to make deliveries *or to do any act for which a license is required of businesses* located in the City of Mobile;

"(4) For storing, storing for sale or use, withdrawing from storage for sale or use, any or all of which acts or transactions are done in or from the City of Mobile;

"And each and every person, firm, company, association, partnership, agency or corporation, wherever located, engaging in or carrying on or doing any act or thing herein specified, in or from the City of Mobile, Alabama, shall pay the City of Mobile an annual license therefor as follows, to-wit:

. . . . . .

"193. GAS COMPANIES: Each person, firm or corporation engaged in the business of selling or distributing natural gas, in an amount equal to 3% of the gross receipts for the business transacted by such person, firm or corporation, in the City of Mobile for the preceding year from the sale of such natural gas sold or distributed from any point or points in the City of Mobile by such person, firm or corporation for any purpose whatsoever.

"The provisions of the above paragraph to be applied to operation in the Police Jurisdiction on the basis of 1½% of said gross receipts." (Emphasis supplied.)

From the terms of the ordinance, the Mobile license tax applies to the United Gas Pipe Line Company from the time its gas *enters* the *City of Mobile* for the purpose of delivery to Scott and Ideal. Moreover, procurement of a license is a prerequisite to United distributing its gas

within the City of Mobile. This is made evident by Section 19 of the Ordinance:

> "SECTION 19; That any person, firm, association or corporation, who shall engage in any business, trade or profession, or keep any establishment, or do any business or any act for which a license is required by the foregoing ordinance, *without having first obtained such license*, shall, upon conviction, for each day such business, trade or profession or such establishment is kept or carried on and for each act so done, without such license, be fined not less than one nor more than one hundred dollars, and may also be sentenced to imprisonment for not exceeding six months." (Emphasis supplied.)[6]

Thus, United must pay a tax each year before it can supply gas to Scott and Ideal within the City of Mobile.[7] If these deliveries to Scott and Ideal within the City of Mobile are part of the flow of interstate commerce, the ordinance is inapplicable, for it would be a tax whose payment is a precondition to exercising the privilege of engaging in interstate commerce "and that avenue of approach had long been declared unavailable under the Commerce Clause."[8]

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[6] See also Alabama Code of 1940, Tit. 37 Municipal Corporations, § 754:

> "It shall be unlawful for any person, firm, or corporation, or agent of a firm or corporation, to engage in any of the businesses or vocations in a city for which a license may be required *without first having procured a license therefor* . . ." (Emphasis supplied.)

[7] Although the tax is *measured* by the previous year's receipts, the amount so determined must be paid *prior* to doing business in the City of Mobile *each year*.

[8] Northwestern Cement v. Minnesota, 1959, 358 U.S. 450, 464. See Spector Motor Service v. O'Connor, 1951, 340 U.S. 602; Underwood Typewriter Co. v. Chamberlain, 1920, 254 U.S. 113, 119.

The crucial question to be decided, therefore, is whether the gas is moving in interstate commerce when it enters the City of Mobile—at which point the Mobile City tax becomes operative upon it. Everyone agrees that when the gas flows from Louisiana across the Alabama border it is in interstate commerce. We must search, therefore, for some point subsequent to its entry into Alabama at which this interstate commerce is transformed into intrastate commerce, or, at least, becomes *separable* from interstate commerce.[9] Appellee contends that this point of separation is delivery of the gas by United into the distribution system of the Mobile Gas Service Corporation and the reduction in pressure of the gas by both companies within Alabama, prior to its delivery to Scott and Ideal. But the mere fact that the gas moves from pipelines owned by United to pipelines owned by Mobile Gas, without more, is not a sufficient separation, for to this point there has been no change whatsoever in the commodity being shipped. "The separation must be realistic."[10] Thus it must be that the separation from interstate commerce is effected, if at all, by the reduction in the pressure at which the gas is being transported. But is this change any more "realistic"? We think not. Changes are made in gas pressures to facilitate the movement of the gas through the pipelines. Pressures are increased prior to shipment and during the course of shipment, and the pressures are reduced as the gas approaches the ultimate consumers.[11] The gas, however, is moving all the time. The flow of gas from Louisiana to the Ideal and Scott plants is "steady and continuous."[12] It may be that the process of breaking

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[9] See Michigan-Wisconsin Pipe Line Co. v. Calvert, 1954, 347 U.S. 157, 169.

[10] Ibid.

[11] State Tax Commission v. Gas Co., 1931, 284 U.S. 41, 43-44 (Holmes, J.).

[12] See Michigan-Wisconsin Pipe Line Co. v. Calvert, 1954, 347 U.S. 157, 163.

down gas for distribution to local domestic consumers closely resembles the "breaking of an original package,"[13] although the vitality of this "merely mechanical consideration" is open to serious question.[14] We find, however, that the reductions in gas pressure prior to delivery to Scott and Ideal are not sufficiently "realistic" changes to separate the gas from the flow of interstate commerce as it crosses into the jurisdiction of the City of Mobile.[15]

In the course of its argument appellee concedes that sales of gas to industrial consumers in the circumstances of this case are interstate commerce, but argues that these interstate shipments are accompanied by local incidents subject to local taxation.[16] But they fail to go on to meet the question before us, which is whether the City of Mobile has chosen to levy its tax on those local incidents, or whether it has chosen to directly tax the flow of interstate commerce.[17] Thus, appellee contends that the City of Mobile could validly tax *sales* of gas by United to Scott and Ideal. That may be so. But the City has not attempted to tax United's sales made in Mobile, nor the "use" of

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[13] See East Ohio Gas Co. v. Tax Commission, 1931, 283 U.S. 465, 471; Memphis Gas Co. v. Beeler, 1942, 315 U.S. 649, 653.

[14] See Panhandle Pipe Line Co. v. Commission, 1947, 332 U.S. 507, 512.

[15] *Cf.* State Tax Commission v. Gas Co., 1931, 284 U.S. 41, 43-44 (Holmes, J.).

[16] See Pennsylvania Gas Co. v. Public Service Commission, 1920, 252 U.S. 23; Panhandle Eastern Pipe Line Co. v. Public Service Commission, 1947, 332 U.S. 507; Texas Gas Transmission Corp. v. Atkins, Tenn. 1954, 270 S.W.2d 384.

We do not decide whether United's total activities in Mobile provide a sufficient "nexus" for the City to levy a tax without offering *due process*. See Scripto v. Carson, 1960, 362 U.S. 207.

[17] That the tax is apportioned, so that it cannot be duplicated, and does not discriminate against interstate commerce, does not alter its invalidity if the tax is one on the privilege of engaging in interstate commerce. See Spector Motor Service v. O'Connor, 1951, 340 U.S. 602, 609.

the gas sold by United, nor United's property in Mobile.[10] "One must comprehend . . . the difference between the use of magic words or labels validating an otherwise invalid tax and their use to disable an otherwise constitutional levy. The latter this Court has said may sometimes be done."[11] What the City has done in this case, by the words of its ordinance, is to make the procurement of a license a precondition of engaging in interstate commerce within its jurisdiction.

Nor is the evil attending license taxes[12] on interstate commerce merely a question of labels. Provisions for the levy of license taxes are ordinarily accompanied by summary collection procedures.[13] So here, the Alabama Code provides for injunctions against firms who fail to pay municipal license taxes on time.[14] Thus, the effect of nonpayment of a license tax is not the usual slight disruption of commerce which may follow a levy on a delinquent taxpayer's property. Rather, interstate commerce is brought to an immediate halt by means of the injunctive remedy. Moreover, doing business without a license will bring down upon the violator extreme criminal sanctions.[15]

[10] See McLeod v. Dilworth, 1944, 322 U. S. 327, 330; Spector Motor Service v. O'Connor, 1951, 340 U. S. 602. The fact that the tax is measured by gross revenue is not inconsistent with its being a tax on the *privilege* of doing business. Railway Express Agency v. Virginia, 1954, 347 U. S. 359, 367.

[11] Railway Express Agency v. Virginia, 1959, 358 U. S. 434, 441.

[12] Id. at 438, 448.

[13] That the means whereby a tax is to be collected is relevant to a consideration of its effect on commerce is emphasized in Northwestern Cement Co. v. Minnesota, 1959, 358 U. S. 450, 462; Underwood Typewriter Co. v. Chamberlain, 1920, 254 U. S. 113, 119.

[14] See Alabama Code of 1940, Tit. 37, Municipal Corporations, §§ 760-764, entitled "Cumulative Remedies for Collection of License Tax."

[15] See, *e. g.*, Section 19 of the Mobile License Ordinance, quoted in text *supra*.

Since the Mobile City license tax was inapplicable to sales of gas by United to Scott and Ideal, the district judge erred when he granted summary judgment for United. The judgments are reversed and the causes remanded.

REVERSED AND REMANDED.

A true copy.

Test:

EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals, Fifth Circuit,
New Orleans, Louisiana.

December 5, 1960.

APPENDIX B

(October 5, 1960)

ON PETITION FOR REHEARING

Before RIVES, Chief Judge, and JONES and WISDOM, Circuit Judges

PER CURIAM: United raises certain questions concerning the opinion of the Court, which we shall briefly attempt to clarify.

We held that the tax is on the act or privilege of delivering gas in the City of Mobile. This is the *incidence* of the tax.

Next, we decided that the delivery of the gas as the terminal act of its transportation from without the State is inseparable from interstate commerce, and not merely a "local incident" of such commerce. In our discussion of this point, we said: "The crucial question to be decided, therefore, is whether the gas is moving in interstate commerce when it enters the City of Mobile at which point the Mobile City tax becomes operative *upon it*." (Emphasis supplied.) We did not mean, by that sentence, to convey the idea that the tax is being levied on the gas itself. The *incidence* of the tax was resolved earlier in the opinion. At the juncture at which the quoted sentence appears in the opinion we were concerned only with determining where the act taxed by the City of Mobile stood in relation to the flow of interstate commerce. We held that delivery of the gas directly to industrial consumers in the City of Mobile is a integral part of its movement in interstate commerce, and that a tax on the privilege of making such deliveries is a burden on interstate commerce.

The petition for rehearing is

DENIED.

A true copy.

Test:

EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals, Fifth Circuit,
New Orleans, Louisiana.

December 5, 1960.

APPENDIX C

(November 16, 1960)

ON SECOND PETITION FOR REHEARING

Before RIVES, Chief Judge, and JONES and WISDOM, Circuit Judges

PER CURIAM: To clear up any ambiguity which may remain in our opinion and holding, we intended to hold and do hold that the Mobile City license tax is inapplicable as to gross receipts for the gas distributed by United directly to Ideal and Scott. In our opinion, however, the tax is applicable to the gross receipts of the local distributor, Mobile Gas Service Corporation.

United properly reimbursed Mobile Gas for the increased taxes paid by Mobile Gas on account of distributions to Ideal and Scott pursuant to United's contract with Mobile Gas.

The second petition for rehearing is

DENIED.

A true copy.
Test:

EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals, Fifth Circuit,
New Orleans, Louisiana.

December 5, 1960.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

Nos. ~~721~~ and 778

~~S. Ct.~~ 6

UNITED GAS PIPE LINE COMPANY,
Petitioner, Appellant

v.

IDEAL CEMENT COMPANY,

and

SCOTT PAPER COMPANY,
Respondents, Appellees

NO. 721, ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 778, ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CITY OF MOBILE, ALABAMA

FRED G. COLLINS,
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IN THE

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OCTOBER TERM, 1960

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UNITED GAS PIPE LINE COMPANY,

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No. 778, ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CITY OF MOBILE, ALABAMA

Interest of Amicus Curiae

The City of Mobile, Alabama (hereinafter Mobile) files this brief pursuant to Rule 42(4) of the rules of this Court, urging the Court to review and reverse the

decision of the Court of Appeals for the Fifth Circuit reported at 282 F.2d 574 (see also 282 F.2d 580) and restore the decision of the District Court (176 F. Supp. 748).

Mobile is a political subdivision of the State of Alabama, and this brief is sponsored by its authorized law officers.

The validity of Mobile's taxing ordinance, in relation to the commerce clause of the federal Constitution, is the subject of this controversy, though Mobile is not a party to the suit. Notwithstanding technical principles of res adjudicata (opinion below, App. A, Jurisdictional Statement, at p. 20), the effect and sweep of the decision of the Fifth Circuit is to knock out the taxing power of Mobile, and the state, over a subject historically treated by this Court and the Congress as a subject of both local regulation and taxation, namely, the direct sale of natural gas by interstate pipelines to industrial consumers (local regulation, *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507; local taxation, *Southern Natural Gas Corporation* v. *Alabama*, 301 U.S. 148). For the city government, there is also placed in jeopardy past tax collections involving a half-million or more dollars.

This novel denial of an established taxing power over interstate companies doing a local business will immediately place local distributors of natural gas to industrial users at a competitive disadvantage (which this Court deemed an important consideration in *International Harvester Co.* v. *Dept. of Treasury of Indiana*, 322 U.S. 340, 349). Moreover, if the decision is permitted to stand it opens the way for an increased yet simple form of avoidance of municipal and other

state taxation by both interstate pipelines and electric power companies who, by a slight change of a line or other installation, or of merely business arrangements, can serve industries in the state directly with natural gas and power from out-of-state, tax free.[1]

The means used by the Fifth Circuit in making such a result possible is the "victory for empty formalism" rejected by this Court in *City of Detroit v. Murray Corp.*, 355 U.S. 489, 493, and should be rejected here to demonstrate once again that this Court is "on guard against impoisoning the taxing power of the states within formulas that are not compelled by the Constitution." *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 445.

Review By Appeal or Certiorari

Appellant or petitioner, United Gas Pipe Line Company (hereinafter United), obtained a judgment of the United States District Court for the Southern District of Alabama for recovery from two of its direct industrial customers, Ideal Cement Company (Ideal) and Scott Paper Company (Scott), of the license or business taxes it paid Mobile based on United's sales of natural gas to these customers. The judgment

[1] The likelihood is accentuated by the Court of Appeal's recognition that receipts from gas supplied to the industrial customers by a local distributor is subject to the tax, and by subjecting to the tax even that portion of the distributor's service charge to the interstate pipeline company when it acts as agent for the pipeline company in transporting the gas to, and collecting the price from, the industrial customers, but exempting from the tax the net proceeds (*i.e. minus the service charges*) to the pipeline company. (On Second Petition for Rehearing, Nov. 16, 1960, see App. C, Jurisdictional Statement, p. 30).

rested on the validity of the taxing ordinance and agreements by the customers to reimburse United for valid taxes. 176 F. Supp. 748.

The Fifth Circuit reversed the District Court, holding that the application of the taxing ordinance to sales and deliveries to these direct industrial customers by United was a direct tax on the flow of interstate commerce and a violation of the commerce clause of the Constitution.

United has filed both an appeal and a petition for certiorari from this action of the Court of Appeals. While either procedure should accomplish the necessary review, the action of the Fifth Circuit is properly the subject of an appeal under 28 U.S.C. 1254(2), which covers, under the precedents, municipal ordinances "held by a court of appeals to be invalid as repugnant to the Constitution." Appeals were allowed in like situations, where both appeal and petition for certiorari were presented, in *City of Detroit* v. *Murray Corp.* 355 U.S. 389, and in *City of Chicago* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 357 U.S. 77.

ARGUMENT

The Tax Ordinance

The ordinance in issue is described as the License Code of the City of Mobile enacted, under authorization of state law,[2] in December, 1954, effective for the years 1955 and thereafter. The ordinance provides

[2] Title 37, section 735, Code of Alabama 1940, as amended. Section 745 as amended in 1949 limits the tax on gross receipts of utilities to 3%. Under section 735, all businesses may be covered, but in the case of interstate business only that portion confined within the limits of the state and where the person or firm has an office or transacts business in the city or town.

for what is described as a "license tax" or "privilege tax" (see section 20 thereof) imposed on persons or firms for the privilege of engaging in named businesses in the City of Mobile or the environs subject to its jurisdiction (the so-called police jurisdiction). Other than the payment of the tax on an annual basis, and the making of a sworn statement to support it, no other conditions are imposed.

In the case of gas companies, with which this case is concerned, the tax is measured by the gross receipts from sales within the jurisdiction of Mobile for the preceding year (3% of gross receipts for Mobile proper, 1½% for the police jurisdiction). No distinction is made between persons and firms engaged in interstate or intrastate business; but section 16 of the ordinance provides that no provision of it shall be applied to impose any unlawful burden on interstate commerce or in any manner repugnant to the constitutions of the United States or Alabama, and section 24 provides severability if any provision of the ordinance should be held invalid.

The penalties for failure to pay the license tax when due or delinquent, or to engage in business without paying the tax, are those usually associated with the collection of taxes, such as increase of the amounts otherwise due, fine, imprisonment, and tax lien against property used in the business (sections 17, 19, 20, 21). The ordinance makes no claim to injunctive relief against persons or firms who do not pay, though the Court of Appeals appeared to attach significance to the alleged existence of the remedy of injunction under the state code of Alabama (Appendix A, Jurisdictional Statement, p. 27). This is a matter we will discuss later.

In the context of this case, the business for which the license or privilege tax is exacted is that of selling or distributing (a synonym in the natural gas trade for selling and transmitting at retail) natural gas to consumers in Mobile or its police jurisdiction. Actually, the transactions involved in this case were effected by the local distributor, Mobile Gas Service Corporation, which, as agent for United, delivered the gas to the industrial consumers through its lines and billed and collected the purchase price. From the purchase price the local distributor deducted an agreed 2 cents per thousand cubic feet service charge, and remitted the balance to United. The local distributor paid the license or privilege tax on the 2 cents per mcf service charges, which the Court of Appeals upholds as proper; but the tax on the balance of the proceeds, paid over to United, the Court of Appeals has struck down as violating the commerce clause of the Constitution.

Direct Interstate Sales to Consumers Are Local Acts

If there is one proposition which has been established in our jurisprudence, by decisions of this Court and by Act of Congress, it is that direct sales and deliveries of natural gas by interstate pipeline companies to industrial consumers are local acts for purposes of regulation and taxation. This was so both before and after the adoption of the Natural Gas Act, and was confirmed as recently as this Court's decision of January 23, 1961 in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, Nos. 45 and 46, Oct. term 1960, slip op. p. 25.

Before adoption of the Natural Gas Act of 1938 (52 Stat. 821, as amended, 15 USC § 717 et seq.), this Court said, in upholding local regulation of rates, that the

direct transmission of natural gas from a source outside the state to local consumers in the state:

> "'while part of interstate transmission is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State; nevertheless, the service rendered is *essentially local*, and the sale of the gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to *factories* and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city." [emphasis added] *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23, 30-31.

And the Court went on to hold that this local service is not of that character which requires general and uniform regulation of rates by congressional action, 252 U.S. at 31.

In *Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298, which distinguished transportation and sales by interstate pipeline companies to distributing companies for resale, the Court nevertheless went on to point out that:

> "The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the *transporting company* or by independent distrib-

uting companies." [emphasis added] 265 U.S. at 309.

Barrett was so quoted and relied on by the Court in upholding a state excise tax on a pipeline corporation supplying natural gas to consumers, *East Ohio Gas Company* v. *Tax Commission of Ohio*, 283 U.S. 465, 472.

After the adoption of the Natural Gas Act of 1938, this Court again upheld local regulation of rates of direct sales by interstate pipeline companies to industrial consumers as a matter specifically recognized by Congress in the adoption of the Act, *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507 (first *Panhandle* case). It was held that, historically, direct sales to consumers, as distinct from sales for resale, had been in the permissible area of state control, and that now the line of the statute cut sharply between the two on the same line arrived at before the Act was passed. 332 U.S. at 514, 517. Significantly, in relation to the instant problem, the Court noted:

> "... . [T]he Supreme Court from the beginning allowed the state both *to tax* and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if this first sale is also necessarily the last sale because consummated by consumption. Powell, Note, 58 Harv. L. Rev. 1072, 1082." [emphasis added] 332 U.S. at 517, fn. 12.

This authority was used most recently by the Court in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, Nos. 45, 46, Oct. term 1960 (January

23, 1961), slip op. p. 25, citing and relying on the first *Panhandle* case, supra, respecting state control of direct sales of natural gas by interstate pipelines, and pointing out:

> "This power was recognized at the time the Act was passed, see Powell, Note, Physics and Law Commerce in Gas and Electricity, 58 Harv. L. Rev. 1072, and it is clear that Congress excepted federal regulation of direct sales precisely for this reason. See H.R. Rep. No. 709, 75 Cong., 1st Sess. 1-2."

It is obvious from that underlying Report, to quote it, that "there is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction." H.R. Rep. No. 709, 75 Cong. 1st Sess., p. 1.

In the second *Panhandle* case, *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, further underscoring local control, this Court upheld a state requirement of a certificate of public convenience and necessity for an interstate pipeline company to make direct sales to industrial consumers of natural gas. The Court held this was not a violation of the commerce clause of the Constitution, that it was permissible regulation not prohibition. The sales, said the Court, are interstate commerce but are "essentially local" in aspect and subject to state regulation without infringement of the commerce clause. The pipeline proposes to use the streets of Detroit and its environs. "Direct sales for consumptive use were designedly left to state regulation." 341 U.S. at 333, 334.

Local Taxing Valid Unless It Imposes Regulation In Conflict With Federal Regulation

The pattern of local regulation of rates and certificates for direct sales of natural gas by interstate pipeline companies to industrial consumers has progressed hand-in-hand with local taxation of such business, without clash with the commerce clause of the federal Constitution. This is not strange, in view of the "extremely limited restrictions that the Constitution places upon the states"[3] in the exertion of taxing power, and more pointedly because a local tax is judged to violate the commerce clause only if its effect is to "regulate" in conflict with national power. As Mr. Justice (later Chief Justice) White explained in *American Steel and Wire Co. v. Speed*, 192 U.S. 500, 521, the question to be determined is not whether "interstate commerce was to be considered as having completely terminated," but whether a particular exertion of taxing power by a state "so operated upon interstate commerce as to amount to a regulation thereof, in conflict with the paramount authority conferred upon Congress." The concept is repeated in many cases. Illustrative is the discussion in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45, where Mr. Justice (later Chief Justice) Stone spoke for the Court of the forms of taxation where the tendency is to prohibit the interstate commerce or place it at a disadvantage in competition with intrastate commerce, as familiar examples of state taxing power used in an unconstitutional manner "be-

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[3] *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 445, repeated with approval in *Northern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457.

cause of its obvious regulatory effect upon commerce between the States."

The meaning of "prohibited regulatory effect" upon commerce, the Court went on to say, is "a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage." 309 U.S. at 45, fn.2.[4]

A more detailed index of factors in deciding whether the tax has a prohibited regulatory effect was provided in *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662. In that case Mississippi was sustained in imposing a privilege tax for conducting business activities measured by the gross proceeds of a firm engaged in the business of operating a pipeline that transported oil between points within the state in the course of the interstate journey of the oil. The prevailing opinion of the Court was that even if this were to be regarded as a "direct" tax on the "privilege" of engaging in interstate commerce the tax does not violate the commerce clause of the Constitution:

> "Since all the activities upon which the tax is imposed are carried on in Mississippi, there is no due process objection to the tax. The tax does not discriminate against interstate commerce in favor of competing intrastate commerce of like character. The nature of the subject of taxation makes apportionment unnecessary; there is no attempt

[4] Another apt summation of "prohibited regulatory effect" upon commerce was provided by Mr. Justice Cardozo when he said in *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 527:

> "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation."

to tax interstate activity carried on outside Mississippi's borders. No other state can repeat the tax. For these reasons the commerce clause does not invalidate this tax." (citations of authorities omitted) 337 U.S. at 667-668.

Local Taxation of Direct Selling of Natural Gas To Consumers

Thus the economic burden of nondiscriminatory local taxation on direct interstate sales and deliveries of natural gas to consumers has been viewed as entirely consistent with the local economic regulation expressly reserved to the states over this phase of interstate commerce.

In *Southern Natural Gas Co.* v. *Alabama*, 301 U.S. 148, this Court sustained a franchise tax on an interstate pipeline company doing business in Alabama (computed on total capital employed in the state), where the company had three customers engaged in distribution (resale) and one direct industrial consumer customer. The Court viewed the tax as one on the privilege of doing business in Alabama and rested its validity on the fact that the pipeline company had one direct industrial consumer customer, the meeting of whose needs, said the Court, are as much a local activity as the supplying of service to consumers in municipalities, the taxing of which was upheld in the *East Ohio Gas Company* case, supra (283 U.S. 465).

In *Illinois Natural Gas Company* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 505, 506, the Court took note of its decisions which have sustained nondiscriminatory taxes on sales to buyers in the taxing state of commodities shipped interstate in performance of sales contracts, "not upon the ground that the delivery was not part of interstate commerce . . . but be-

cause the tax was not a prohibited regulation of or burden on that commerce." Turning then to *Southern Natural Gas Corp. v. Alabama*, supra, the Court said in that case it had held:

> "the sale of gas to a local industrial consumer by one who was piping the gas into the state was a local business sufficient to sustain a franchise tax on the privilege of doing business within the state, measured by all the taxpayer's property located there, including that used for wholesale distribution of gas to local public service companies."

In *Memphis Natural Gas Company v. Beeler*, 315 U.S. 649, this Court upheld a privilege tax, measured by net income from distribution of natural gas to Tennessee consumers, under an arrangement whereby an interstate pipeline company delivered gas into the mains of a local distributing company for sale and distribution to consumers, with the sale proceeds divided between the two companies (an arrangement not too far unlike that in the instant case). The Court held that the retail sale of gas at the burner tips, whether by one who pipes the gas into the state or by a local distributor who acquired it from an out-of-state pipeline source, is subject to "state taxation and regulation." 315 U.S. at 653, also citing *Southern Natural Gas Corp. v. Alabama*, supra.

With these cases, among others, in mind, it is therefore not surprising that the Court should observe by the time of the first *Panhandle* case, decided in 1947, that from the beginning the Court allowed the state to tax, as well as fix the prices of, direct interstate sales or deliveries of natural gas (and electricity) to consumers, 332 U.S. at 517, fn 12, quoted above.

The Tax Is On The Privilege of Selling Connected With Interstate Commerce Which Must Bear Its Share of Taxation

We think the Court of Appeals became unnecessarily distracted by a purported need to find (and failure to find), some physical point at which one could say that the transmission by United to its industrial customers in Mobile is "separable" from interstate commerce, or "transformed into intra-state commerce" in order to sustain the tax (see App. A, Jurisdictional Statement, at p. 25).

The transmission is interstate commerce, and the controlling consideration is that the "privileges closely connected with interstate commerce may be regarded as distinct for purposes of taxation . . . notwithstanding the 'practical continuity' of the taxed productive operation and the interstate movement." *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604, 610.

As the Court there said, in upholding a license tax on the production and use of electric power in compressors to move natural gas in interstate commerce, the exemption of those engaged in interstate commerce from taxation which others bear should not be extended beyond the necessity of keeping that commerce free from interference.

In *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, the Court made the point even plainer when it said:

> "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burdens even though it increases the cost of doing the business. 'Even interstate business must pay its way.' (citations omitted) and the bare fact that one is carrying on

interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business." 309 U.S. at 251.

The instant tax and the tax ordinance is like a score or more of similar taxes and ordinances passed upon and sustained by this Court (noted above and hereinafter), and like hundreds of similar taxes and taxing ordinances in effect throughout the country resting unquestioned upon these decisions. The incidence and impact of such taxes has been aptly described in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, where this Court said that the tax "is conditioned upon a local activity, *delivery of goods within the state upon their purchase for consumption*. . . . The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce" (emphasis supplied) 309 U.S. at 58.

As the Court also said, there is no basis to distinguish a tax on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey, from the tax which may be laid in like fashion on the property itself. Nor is there a distinction between a tax on property, or the sum of all the rights and powers incident to ownership of property, or taxation of the exercise of some of the constituent elements of ownership. Equally, the transfer of possession upon a sale is taxable. 309 U.S. at 52-53.

The Court of Appeals used as its guide the group of cases exemplified by *Spector Motor Service* v. *O'Connor*, 340 U.S. 602, which is clearly inapposite in the

light of the many decisions governing taxability of the privileges connected with the commencement and termination of interstate transportation and transmission. Actually, *Spector* recognized these cases. *Spector* precluded only a tax attached "solely to the franchise of petitioner to do interstate business." 340 U.S. at 609. In arriving at the conclusion that this was the "operating incidence" of the tax (340 U.S. at 608-609), the Court relied on the construction it had specifically asked the Connecticut courts to provide (*Spector* v. *McLaughlin*, 323 U.S. 101), and the Court did not repudiate, but rather accentuated, reliance on *Wisconsin* v. *J. C. Penney*, 311 U.S. 435, 444 (340 U.S. at 606, fn 3). Significantly, the Court said:

> "The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, is subject to the sovereign power of the State. These taxes may be imposed although the payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory." 340 U.S. at 609.

Cases like *Spector* have invariably recognized the permissibility of state levies on incidents connected with interstate commerce that are essentially local and not repeated in each taxing unit. *Joseph* v. *Carter and Weekes S. Co.*, 330 U.S. 422, 429. And, as the minority of the Court in *Spector* pointed out, even "exclusively interstate commerce" receives adequate protection when state levies are fairly apportioned and nondiscriminatory. 340 U.S. at 615.

The Validity of the License Tax

The Court of Appeals has permitted itself to be drawn away from the pertinent precedents and considerations by concentration on the word "license" and labeling this taxing ordinance one which makes "the procurement of a license a precondition of engaging in interstate commerce within its jurisdiction." (App. A, Jurisdictional Statement, at page 27).

It might be borne in mind that this is an ordinance which, apart from the annual payment of the tax, requires no qualifications or performances in order to engage, or before engaging, in business in Mobile, and confers no discretion on the municipal officers to refuse or deny a license. And, of course, it does not single out interstate businesses for treatment different from intrastate businesses. Nowhere in its opinion does the Court of Appeals cite or consider the long line of cases, beginning with *American Manufacturing Company v. St. Louis*, 250 U.S. 459, which has solidified into local taxing structure the so-called license tax or privilege tax on specified businesses, measured by the volume of business done even though that business is part of interstate commerce.

In *American Manufacturing Company v. St. Louis*, the city ordinance imposed a tax on manufacturers as a condition of the grant of a license to carry on a manufacturing business in the City of St. Louis. The amount of the tax was ascertained by and proportioned to the amount of sales of the manufactured goods whether sold within or without the state, and whether in domestic or interstate commerce. Failure to pay the license tax was a misdemeanor punishable by fine and imposition of a double tax, and the making of a false state-

ment respecting the amount of sales was punishable by forfeiture of the license in addition to the fine. The Court held that whether the state tax deprived one of rights under the Constitution, depends "not upon the form of the act nor upon how it is construed or characterized by the state court, but upon its practical operation and effect." (250 U.S. at 462-463). Said the Court, there is no doubt of the power of the state or of the city to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city. The operation and effect of the tax ordinance is to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental or indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. It is, therefore, not a regulation of interstate commerce. The Court went on to approve the measuring of the tax by the amount of goods sold, though it might have been measured upon the value of all goods manufactured, whether sold or not.

Thereafter, in case after case, this Court has upheld the license or privilege or occupation tax in such notable examples as: *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172, an occupation tax, in this case on the business of mining measured by the value of the ore produced even though the ore was loaded immediately upon cars for shipment out of state; *Hope Natural Gas Company* v. *Hall*, 274 U.S. 284, a West Virginia occupation tax on the business of producing natural gas, measured by the value of the gas produced even though the gas is transported to other states for consumption; *Utah*

Power and Light Company v. *Pfost*, 286 U.S. 165, a state license tax on the business of producing electrical energy measured by the energy produced, notwithstanding the fact that production of electrical energy and transmission in interstate commerce are substantially instantaneous; *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472, a South Carolina license tax upon importing and storing gasoline from outside the state; *Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250, a privilege tax on business measured by a percentage of gross receipts, in this case, from the sale of advertising space to in-state and out-of-state advertisers in a magazine circulated in and out of the state; *Cornelale* v. *Arkansas-Louisiana Pipe Line Company*, 303 U.S. 601, a Louisiana license tax on persons engaged in the business of manufacturing or generating electricity and on the privilege of using electric power in business, in this case, moving natural gas through an interstate pipeline; *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, a privilege tax on the declaring and receiving dividends out of income derived from property located and business transacted in Wisconsin even though the dividends were declared by a foreign corporation outside Wisconsin; *Memphis Natural Gas Company* v. *Beeler*, 315 U.S. 649, a Tennessee privilege tax on the business, in this case, of distributing natural gas to consumers from out-of-state sources, measured by net income from the distribution; *Memphis Natural Gas Company* v. *Stone*, 335 U.S. 80, a Mississippi privilege tax on the doing of business in the state, measured by the capital employed in the state, in this case upon a natural gas pipeline company, which did no intrastate business in Mississippi, but which maintained part of its interstate pipeline and compressor stations in Mississippi; *Interstate*

Oil Pipe Line Company v. *Stone*, 337 U.S. 362, a Mississippi privilege tax on business activities in the state measured by gross proceeds levied, in this case, on a pipeline company transporting oil within the state in the course of its interstate journey.

Practical Operation Governs, Not Labels

It is thus unmistakable that this Court has never been troubled that the local tax takes the form of a license tax on the privilege of doing local business. This Court has said (and repeated in different ways):

> "'in passing on its constitutionality, we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' . . . For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. 'A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.'" *Wisconsin* v. *J. C. Penney, Co.*, 311 U.S. 435, 444.

And, most recently, in *City of Detroit* v. *Murray Corporation*, 355 U.S. 489, 492, in sustaining a municipal ordinance against attack on grounds of unconstitutionality, this Court made plain that it was not concerned with the style of a taxing ordinance nor with its definition or the precise form of the descriptive words, but only with the practical operation, and said that the Court must "look through form and behind

labels, to substance. This is at least as true to uphold a state tax as to strike one down."

An Inapplicable or Unenforceable Remedy For Collection Does Not Defeat The Valid Tax

In its concern with form and labels, the Court of Appeals has compounded the error respecting the Mobile license tax by presuming, contrary to the exhortations of this Court, that the Mobile license tax ordinance will so operate that if, for example, a tax is not paid, there will be an immediate halt, by means of injunctive remedy, to the flow of interstate commerce (App. A, Jurisdictional Statement, at p. 27). Not only is there not a shred of evidence in the record that any such consequence has at any time flowed from the local administration of the ordinance, or that this is the local administrative or judicial interpretation of this ordinance, but the Court of Appeals has done what the Supreme Court has said neither a federal court nor a state court should do, i.e., "assume in advance that a construction will be adopted such as to render the law obnoxious to the federal constitution." *Utah Power and Light Company* v. *Pfost*, supra, 286 U.S. 165, 187.

This same problem was considered, not only in the *Utah Power and Light Company* case, but also at great length in *St. Louis SWR Co.* v. *Arkansas*, 235 U.S. 351. In that case the Arkansas franchise tax was imposed on the foreign corporation doing business in Arkansas for the privilege of exercising its franchise in the state, and was levied on the proportion of the capital stock represented by property owned and used in business transacted in the state. The Court upheld the tax as a legitimate imposition on a foreign corpora-

tion with respect to the exercise of the privilege of transacting business in the state.

Section 20 of the tax act also provided that, if a corporation failed to pay the tax, the Tax Commission shall cancel the certificate and the corporation shall forfeit its right to do business in the state, in addition to other penalties prescribed. The Court held that if this provision must be construed to mean that for non-payment a foreign railroad corporation engaged as a common carrier of intrastate and interstate commerce is to forfeit its right to do business in the state, not only with respect to intrastate, but also with respect to interstate commerce, the effect would be to impose a condition on the right to transact interstate commerce and the act would be invalid, as amounting to a regulation of interstate commerce unless the provision could be treated as separable.

But, said the Court, the state court has not as yet construed the section as calling for forfeiture of the privilege of doing interstate business in the event of non-payment, nor does the state insist on such a construction. The present action is an ordinary action to collect the tax as a debt, but not to forfeit the franchise. Further, said the Court, it is probable that the state court, when confronted with the question, would hold that the franchise to be forfeited is confined to intrastate commerce. It is proper for this Court to wait until the state court has adopted a construction of the statute on the facts rather than assume in advance that such a construction will be adopted as to render the law repugnant to the federal Constitution. At the present, therefore, we (the Court) have merely to inquire whether provision so clearly requires a forfeiture of the interstate franchise for non-payment that it is

not reasonable to anticipate the state court will put another construction upon it. The Court ought not indulge the presumption either that the legislature intended to exceed the limits imposed on state action by the federal constitution, or that the courts of the state will so interpret the legislation as to lead to that result. No canon of construction is better established or more universally observed, that if a statute will bear two constructions, one within, and the other beyond the constitutional power of the law-making body, the courts should adopt that which is consistent with the Constitution because it is to be presumed that the legislature intended to act within the scope of its authority.

Continuing, the Court said the remedial provision taken in context need not be construed to interfere with interstate commerce. The taxing provisions apply to all corporations irrespective of whether engaged in interstate commerce. It is, therefore, natural that the remedy should have language of general scope. But it need not be indiscriminately applied to the several kinds of corporations subject to the Act. "In view of these considerations we ought to assume, until the state, through its judicial or administrative officers, places a different construction upon the Act, that § 20 will be limited in its operation to forfeiting for non-payment of the franchise tax only the privilege of doing intrastate business; or else that the section, being void for unconstitutionality, will be treated as severable from the other provisions of the Act. Under either view it is obvious from what has been already said, that the tax does not amount to a regulation of or a burden upon interstate commerce." 235 U.S. 351, 369-371. And, this rule in testing constitutionality of state tax enactments is applicable whether the controversy

arises in the state or federal courts. *Utah Power and Light Co.* v. *Pfost*, 286 U.S. 165, 186-187, and see *Arizona Copper Co.* v. *Hammer*, 250 U.S. 400, 430.

Thus, in the absence of any evidence, or claim on the part of local authorities, that the ordinance could or would be so used as to bring about a halt to the interstate flow of the natural gas if the taxes were not paid (the ordinance does not even refer to injunctive relief among the remedies specified for its enforcement), this Court has laid out the pattern by which such an ordinance should be construed, which forbids the construction of an unenforceable remedy unnecessary to the existence of the tax, to defeat the otherwise valid local tax.[5]

This salutary concept of reconciliation, which avoids confusing valid local action with invalid or inapplicable alternate remedies for enforcement, has been adopted by this Court in other areas of federal-state accommodation. In *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 162, the Court upheld a state registration requirement imposed on interstate truckers for information purposes. This Court refused to consider the possible effect of a refusal of a permit saying, "It will be time enough to consider apprehended burdensome conditions when and if the state attempts to impose and enforce them." Likewise, in *Castle* v. *Hayes Freight Lines*, 348 U.S. 61, 64, this Court reaffirmed the validity of state weight laws for interstate trucks using the state highways, but

[5] As a minimum, rather than striking down the ordinance on the faulty assumptions made as to the applicability of the alleged remedy of injunction against interstate commerce, the Court of Appeals might have directed a reference to the state courts for interpretation, as was done in *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101.

separated and eliminated the remedy of suspension by the state of the federally certificated right to operate on the highways, pointing to the existence of conventional forms of punishment "as adequate to protect the states from overweighted or improperly loaded trucks."

CONCLUSION

We think it is evident that the Court of Appeals for the Fifth Circuit has, in this case, departed from the rules and precedents set by this Court for determining the constitutionality of the exerted state taxing power by:

1. Fastening on the word or label "license", rather than on the practical operation of the ordinance as a tax;

2. Viewing the tax as a license condition to engage in interstate commerce, rather than a tax on the incident privilege of making sales to consumers at the end of that commerce; and

3. Unwarrantedly associating with the "license" an alleged requirement that it must be revoked and interstate commerce halted if the tax is not paid.

In the latter connection, the Court of Appeals has purported to state or infer a claim for Mobile which Mobile does not profess to make. On the contrary, Mobile's ordinance specifically provides that no provision thereof shall be applied so as to impose an unlawful burden on interstate commerce. The ordinance does not include the licensing ingredients associated with licensing regulation. It requires only the payment of taxes and provides for collection by the ordinary remedies usual in the collection of local taxes.

Unless the Court of Appeals' decision is overturned, the effect will be to exempt interstate commerce from

the taxes which similar local business must bear, beyond the necessity to keep interstate commerce free from interference.

The Court has repeatedly said that interstate commerce must bear its fair share of local tax burdens. Here the privilege of selling and delivering natural gas to industrial consumers at the end of the interstate journey is involved. The sales, deliveries, and use are local, and the earnings therefrom are locally derived. The local taxing power exerted is directly and fiscally related "to the protection, opportunities and benefits" afforded by the taxing jurisdiction.

Mobile joins with the appellants, or petitioners, in respectfully requesting that this Court review and reverse the judgment of the Court of Appeals and restore the judgment of the District Court.

Respectfully submitted,

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FILED
MAR 13 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1960

No. 1151

UNITED GAS PIPE LINE COMPANY,
Petitioner,
vs.
SCOTT PAPER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Appendix "A".

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1960.

No.

UNITED GAS PIPE LINE COMPANY,
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On Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Fifth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent, Scott Paper Company, respectfully says that the petition for writ of certiorari should be denied.

SUMMARY STATEMENT OF REASONS FOR DENIAL OF THE WRIT.

1) The United States Court of Appeals for the Fifth Circuit has not decided an important question of federal law which has not been settled by this Court, but rather has based its decision upon previous opinions involving the same or substantial-

ly the same questions heretofore rendered by this Court, and the decision of the U. S. Court of Appeals in the instant case is not in conflict with these decisions:

2) The U. S. Court of Appeals for the Fifth Circuit has not held the City of Mobile license tax ordinance unconstitutional or even invalid as repugnant to the Commerce Clause of the Federal constitution, but rather has held that, by the terms of the ordinance itself, the tax was invalidly applied to the gross receipts of a foreign corporation entirely engaged in interstate commerce within the State of Alabama and the City of Mobile.

3) This Court has previously, on many occasions, considered the validity of this type of license tax.

4) This Court has no jurisdiction to review the judgment in this case by writ of certiorari under the provisions of Title 28, Section 1254 of United States Code because the Petitioner herein, United Gas Pipeline Company, on January 24th, 1960, filed, in the United States Court of Appeals for the Fifth Circuit, its notice of appeal under the provisions of Title 28, Section 1254(2), United States Code. A copy of Petitioner's notice of appeal and statement of the federal questions presented is attached hereto and marked Appendix "A".

OPINION BELOW.

The opinion of the Court of Appeals for the Fifth Circuit, dated September 2, 1960, is reported at 282 Fed. 2d 574, and its extended opinions denying petitions for rehearing are reported at 282 Fed.

2d 580, and are dated, respectively, October 5, 1960, and November 16, 1960.

PETITIONER'S STATEMENT OF JURISDICTION IS INACCURATE.

A glance at Appendix "A", a copy of the notice of appeal previously filed with the United States Court of Appeals for the Fifth Circuit which is attached hereto, will quickly disclose that the Petitioner herein has already made its election to seek a review by this Court of precisely the same questions which it now presents to this court by its petition. Title 28, Section 1254, United States Code, clearly envisions but one review by this Court of any judgment or decree of a Court of Appeals either by writ of certiorari or by appeal. Title 28, Section 1254, provides, in part:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: *** (2) By appeal by a party relying on a state statute held by a Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the federal questions presented";

Thus the action of the Petitioner in filing its petition for the writ of certiorari is specifically precluded by the provisions of Paragraph 2, Section 1254, Title 28, United States Code.

QUESTION PRESENTED

The questions presented for consideration by

Petitioner are inaccurate and misleading:

The question presented this Court has been summarized accurately and succinctly by the United States Court of Appeals for the Fifth Circuit as follows:

> "The issue in these cases is whether a municipal license tax is applicable to the business of distributing natural gas to industrial consumers within the municipality's taxing jurisdiction, when such distribution is the terminal act of the transportation of that natural gas from without the state." **282 Fed. 2d 575.**

The Court then held that the tax was on the act or privilege of delivering gas in the city of Mobile and that delivery of the gas directly to industrial consumers in the City of Mobile is an integral part of its movement in interstate commerce, and that a tax on the privilege of making such deliveries is a burden on interstate commerce.

Thus, this Court is not called upon to consider whether, as suggested by Petitioner, a license tax on the privilege of selling natural gas is the equivalent of a tax on the preceeding interstate delivery or transportation of the gas.

STATEMENT OF FACTS

Petitioner's statement of the case, Page Four of the petition, is improper in that it is argumentative. Further, the petition does not set out in full the ordinance involved as required by Rule 23(d), but rather quotes only a paragraph of Section 1 of the ordinance which specifies the amount and meth-

od of measurement of the tax on gas companies. The applicable provisions of the ordinance are quoted by the United States Court of Appeals in its opinion beginning on Page 22, Appendix "A", of the Petition and continuing through Page 23, hence these are not repeated here. Further, because the opinion of the United States Court of Appeals contains an accurate statement of the facts in this case, no additional statement of facts is here attempted.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS AND ITS RATIONALE.

The Court of Appeals properly considered the license tax ordinance of the City of Mobile in its entirety. It held that the Mobile license tax is one which attaches to the privilege of entering the City of Mobile or its Police jurisdiction to do business therein and if such tax were applicable to the facts in this case it would be unconstitutional as conflicting with the Commerce Clause of the Federal Constitution. The Court rejected Petitioner's contention that the incidence of the tax was on the sale of gas within the City of Mobile.

> "In the course of its argument Appellee concedes that sale of the gas to industrial consumers in the circumstances of this case are interstate commerce, but argues that these interstate shipments are accompanied by local incidents subject to local taxation. But they fail to go on to meet the question before us, which is whether the City of Mobile has chosen to levy its tax on those local incidents, or whether it has chosen to directly tax the

flow of interstate commerce. Thus, Appellee contends that the City of Mobile could validly tax sales of gas by United to Scott and Ideal. That may be so. But the City has not attempted to tax United's sales made in Mobile, nor the "use" of the gas sold by United, nor United's property in Mobile." "One must comprehend . . . the difference between the use of magic words or labels validating an otherwise invalid tax and their use to disable an otherwise constitutional levy. The latter, this Court has said, may sometimes be done. What the City has done in this case, by the words of its ordinance, is to make the procurement of a license a precondition of engaging in interstate commerce within its jurisdiction." **282 Fed. 2d 579, Appendix "A" to Petition at Page 26.**

However, the Court had previously said:

"No question of the total unconstitutionality of the Mobile ordinance is presented, since the ordinance contains a saving clause which reads as follows: 'No provision of this code shall be applied: (a) so as to impose any lawful tax or unlawful burden on interstate commerce or on any activity of the State or Federal Governments . . .'." **282 Fed. 2d 575, Appendix "A" to Petition at Page 20, Footnote 3.**

Thus, the Court's holding was:

"Since the Mobile City license tax was inapplicable to sales of gas by United to Ideal and Scott, the District Judge erred when he granted Summary judgment for United." **282 Fed.**

2d 580, Appendix "A" to Petition at Page 28.

We have seen how petitioner, by drawing this Court's attention to Paragraph 193 of Subsection 4, Section 1 of the ordinance, would have this Court restrict the operation of the statute to the selling or distributing of natural gas. But the Paragraph in question merely states the rate of tax and its method of measurement with respect to gas companies. The quoted language of Section 1 of the ordinance makes it quite clear that the ordinance is much broader in its scope, and purposely so, in order to make the procurement of a license a precondition for engaging **in any** of the enumerated activities within the City. The fact that the tax is measured by gross receipts is not inconsistent with its being a tax on the privilege of doing business. **Railway Express Agency, Inc. v. Commonwealth of Virginia, 347 U. S. 359, 98 L. Ed 757 (1954).**

Further, it appears conclusively that the Mobile Gas Service Corporation, which transported the gas as United's agent, made no sales to Scott and Ideal and yet properly paid the tax to the City of Mobile based on its gross receipts for making deliveries. This is so because the Mobile Gas Service Corporation is manifestly engaged in intrastate commerce and would require a license from the City of Mobile in order to engage in such business. This Court has often said that where a company is engaged in both interstate and intrastate business a State (or municipal corporation) may impose taxes even though the payment may come out of the funds derived from the taxpayer's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the power of the State and non-discriminatory.

Of necessity, the Court of Appeals based its decision in large measure on the holding of this Court in the case of **Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, 95 L. Ed 573 (1951)** wherein this Court said, at pages 608, 609, 610:[1]

> "The incidence of the tax provides the answer. The Courts of Connecticut have held that the tax before us attaches solely to the franchise of Petitioner to do interstate business. * * *
> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was **exclusively** interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the State. Alpha Portland Cement Co. v. Commonwealth of Massachusetts, 268 U. S. 203, 45 S. Ct. 477, 68 L. Ed. 916, 44 A.L.R. 1219 (measured by percentages of "corporate excess" and net income); Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 45 S. Ct. 184, 69 L. Ed. 439 (measured by percentage of capital stock and surplus). See Interstate Oil Pipe Line Co. v. Stone, 337 U. S. 662, 669 et seq., 69 S. Ct. 1264, 1267, 93 L. Ed. 1613 (1621) (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 442, 67 S. Ct. 815, 91 L. Ed. 993; Freeman v. Hewit (329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265), supra.

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[1] Citations to United States Supreme Court cases are from United States Reports.

"Our conclusion is not in conflict with the principle that, where a taxpayer is engaged both in intrastate and interstate commerce, a State may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the State, including both interstate and intrastate. Interstate Oil Pipe Line Co. v. Stone, (337 U. S. 662, S. Ct. 1264, 93 L. Ed. 1613), supra; International Harvester Co. v. Evatt, 329 U. S. 416, 67 S. Ct. 444, 91 L. Ed. 390; Atlantic Lumber Co. v. Commissioner of Corporations and Taxation, 298 U. S. 553, 56 S. Ct. 887, 80 L. Ed. 1328."

The Lower Court also based its opinion upon this Court's ruling in **Railway Express Agency, Inc. v. Commonwealth of Virginia, supra,** wherein the Railway Express Agency was admittedly doing entirely interstate business and this Court said at Page 367, 368:

". . . It contends that this obvious burden on interstate commerce is validated by state protection of a localized incident in the course of the business. The three incidents are originating the interstate movement, which requires local pickup of the parcels; terminating the movement, which requires delivery, and movement through the State. If each of these incidents is sufficient warrant for taxing gross revenues from wholly interstate commerce, a concern doing a nationwide business is vulnerable to a gross revenue tax in

every one of the forty-eight states. But it is argued that this is permissible, provided the states formulate their burden so as each to burden it proportionately, not encroaching on the other's right to burden. **It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax.** Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, 95 L. Ed. 573, 71 S. Ct. 508; Memphis Steam Laundry Cleaners, inc. v. Stone, 342 U. S. 389, 96 L. Ed. 436, 72 S. Ct. 424; Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396; New Jersey Bell Tel. Co. v. State Board of Taxes & Assessments, 280 U. S. 338, 7 L. Ed. 463, 50 S. Ct. 111." **Emphasis supplied.**

The Petitioner has admitted both in the District Court and in the Court of Appeals that it is exclusively engaged in interstate commerce within the City of Mobile, but has argued that certain decisions of this Court relating to the application of the Natural Gas Act, 15 U. S. C. 717, and the powers of states to regulate sales of gas where there are present certain local incidents, require the conclusion that what a state or municipal corporation may regulate it may also tax. This contention was rejected by the Court of Appeals. See **Michigan-Wisconsin Pipe Line Co. v. Calvert 347 U. S. 157, 92 L. Ed. 583 (1954).**

THE HOLDING OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT

The holding in the instant case is not in conflict with the decisions of this Court in the following cases: **Pennsylvania Gas Company v. Public Service Commission, 252 U. S. 23, 64 L. E. 434 (1920); East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 75 L. Ed. 1171 (1931); Memphis Gas Company v. Beeler, 315 U. S. 649, 86 L. Ed. 1090 (1942); Panhandle Eastern Pipe Line Company v. Public Service Commission, 332 U. S. 507, 92 L. Ed. 128 (1947); Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U. S. 329, 95 L. E. 993 (1951).**

In Pennsylvania Gas Company v. Public Service Commission, supra, the gas company transported gas from Pennsylvania into New York where it sold and delivered the gas at retail to local consumers who were supplied from a main by pipes laid through streets. The sole question involved in this case was the power of the Public Service Commission to **regulate local sales** of gas. The Court held that the transmission, sale and delivery of the gas was interstate commerce, saying, at Page 28, 29:

> "We think that the transmission and sale of natural gas produced in one state, transported by means of pipe lines, and directly furnished to consumers in another state, is interstate commerce within the principle of the cases already determined by this court. West v. Kansas Natural Gas Co. 221 U. S. 229, 55 L. Ed 716, 35 L.R.A. (N.S.) 1193, 31 Sup. Ct. Rep. 564; Haskell v. Kansas Natural Gas Co.

224 U. S. 217, 56 L. Ed. 738, 32 Sup. Ct. Rep. 442; Western U. Teleg. Co. v. Foster, 247 U. S. 105, 62 L. Ed. 1006, 1 A.L.R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 38.

"... In the instant case the gas is transmitted directly from the source of supply in Pennsylvania to the consumers in the cities and towns of New York and Pennsylvania, above mentioned. Its transmission is direct, and without intervention of any sort between the seller and the buyer. The transmission is continuous and single, and is, in our opinion, a transmission in interstate commerce, and therefore subject to applicable constitutional limitations which govern the states dealing with matters of the character of the one now before us."

In 1931 this Court rendered its decision in East Ohio Gas Company v. Tax Commission of Ohio, supra. This case apparently held that where the pressure of gas was reduced before delivery, this pressure reduction was analogous to the breaking of an original package, after shipment in interstate commerce, and hence, that the furnishing of gas at reduced pressures by East Ohio Gas Company was not interstate commerce, but rather a business of purely local concern exclusively within the jurisdiction of the State.

The East Ohio Gas case, while it dealt with taxation rather than regulation, as in Pennsylvania Gas Company, has not been followed by this Court in later cases, and indeed, as we shall see, this Court later repudiated the so-called pressure reduction test

on which it based, at least in part, its holding in East Ohio.

But in any event, the East Ohio Gas Company case can be distinguished from the instant case in at least two particulars. First, East Ohio was an Ohio corporation which received at least twenty-five per cent of its gas from its own wells located within the State of Ohio, clearly intrastate commerce, and, second, the gas company was engaged in the business of furnishing natural gas under local franchises in more than fifty municipalities in Ohio.

Even in 1931, this Court held, in **State Tax Commission of Mississippi v. Interstate Natural Gas Company, Inc., 284 U. S. 41, 76 L. Ed. 156** that a natural gas company engaged in transporting, selling and delivering gas to local distributing companies for resale was engaged in interstate commerce, and that hence a state privilege tax was unenforceable even though the pressure of the gas was reduced by Interstate Natural Gas Company before it passed into the purchasers' hands.

Memphis Gas Company v. Beeler, supra, involved a corporation organized elsewhere, but licensed by the State of Tennessee to do business therein. Memphis Gas Company had a franchise from the City of Memphis and maintained its principal office in Memphis where it managed its business. A Tennessee tax on net earnings arising from business done wholly within the State was upheld by this Court against the contention that the activity of Memphis Gas Company constituted only an interstate sale to distributors. Under the facts of this case, the Supreme Court of Tennessee had held that Memphis

Gas Company had entered into a profit-sharing contract with a local company to distribute gas within the City of Memphis and that this contract constituted a joint enterprise. This Court accepted the finding of the Supreme Court of Tennessee with regard to this point, and said, at Page 656:

> "Taxpayer's contributions to the joint undertaking with the Memphis Company for the distribution of gas to local consumers, and its activities at its Memphis general office in supplying the gas to be distributed for the joint account as required by the Memphis Company and in safeguarding and securing payments of its share of the profits went beyond a mere sale, to a distributor, of gas in interstate commerce."

As in the East Ohio case there were present activities on the part of the taxpayer which were clearly separable from the flow of interstate commerce.

The question presented in Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, supra, the first Panhandle case, was whether the Public Service Commission of the State of Indiana might **regulate** sales of gas by Panhandle Pipe Line Company direct to industrial consumers. Against the contention that the Natural Gas Act, supra, precluded such regulation, this Court held that sales to the local distributing companies, the municipalities, and the large industrial consumers were all sales in interstate commerce, but that simply because of its election to regulate sales to distributors for resale, Congress had not placed under the control of the Federal Power Commission the

regulation of direct sales to industrial consumers. Such regulation was reserved to the states.

This Court repudiated the so-called pressure reduction test applied in the East Ohio case saying, at Page 513:

> "Neither practical common sense nor constitutional sense would tolerate holding that reduction in pressure makes the industrial sales to Anchor-Hocking wholly intrastate for purposes of local regulation while deliveries at similar pressures to utility companies remain exclusively interstate. Variations in main pressure are not the criterion of the state's regulatory powers under the Commerce Clause. C. F. Interstate Natural Gas Company v. Federal Power Commission, 331 U. S. 682, 689, 91 L. Ed. 1742, 1747, 67 S. Ct. 1482. These sales here were clearly in interstate commerce."

This holding was reaffirmed in Panhandle Eastern Pipe Line Company v. Michigan Public Service Commission, supra, the second Panhandle case.

Petitioner has used the terms regulation and taxation almost interchangeably but it does not follow that what a state or municipal corporation may regulate under its Police power it may also tax. This Court, in **Freeman v. Hewitt, 329 U. S. 249, 91 L. Ed. 265 (1946), said at Page 253:**

> "The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a state of a particular source of revenue, attempts at

such taxation have always been more carefully scrutinized and more consistently resisted than Police powers of regulations of aspects of such commerce * * *."

In **Mississippi River Fuel Corp. v. Hoffman, 4 Ill. 2d 468, 123 N. E. 2d 503 (1955), cert. den. 349 U. S. 935, 99 L. Ed. 1264 (1955)**, the Illinois Supreme Court, in considering a gross receipts tax which the state sought to impose on a pipeline company, accurately analyzed the Panhandle cases, holding that sales of gas made in a manner almost identical with that of the instant case were not subject to the tax. That Court said:

> "Appellants have allowed themselves to become confused between interstate commerce in its constitutional aspect and that part of interstate commerce which Congress chose to take under Federal regulation by the Federal Natural Gas Act of 1938, 15 U. S. C. A., Sections 717 et seq. In that act Congress gave to the Federal Power Commission power to regulate rates and all other aspects of sales of gas by interstate pipelines to purchasers for resale, the purchasers being, in general, local public utility companies. But in that act, Congress refrained from giving to the Federal Power Commission power to regulate the rates for gas sold by interstate pipelines to customers who took gas for their own use. (See Panhandle case.) **But this statutory distinction which Congress elected to make certainly did not mean, as appellants seem to deduce, that the sales for resale were sales in interstate com-**

merce while the sales to industries for their own use were not. Jurisdiction over both types of sales could without question have been given by Congress to the Federal Power Commission had it chosen. It was because of this statutory choice, by Congress, that the Panhandle case quoted from above was decided as it was. The quoted language from the opinion in that case shows as plainly as possible that the United States Supreme Court fully recognizes the interstate character of industrial gas sales such as are here involved. The very recent case of Phillips Petroleum Co. v. State of Wisconsin, 347 U. S. 672, 74 S. Ct. 794, decided June 7, 1954, accords in principle with the Panhandle decision. There it was held that the Phillips Petroleum Company in selling gas to an interstate pipeline, was doing an act which amounted to participation in interstate transportation of gas and hence was subject to the Federal Power Commission. The late case of Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U. S. 157, 74 S. Ct. 396, is in principle the same. It also was a case where a local producer of gas introduced it into an interstate pipeline. The court held a Texas State tax on the gathering of the gas to be invalid as a burden on the interstate transaction of selling and delivering the gas to the pipeline. The Court said, 74 S. Ct. at Page 401, 'The recurring problem is to resolve a conflict between the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state's rightful de-

sire to require that interstate business bears its proper share of the costs of local government in return for benefits received. Some have thought that the wisest course would be for this Court to uphold all state taxes not patently discriminatory, and wait for Congress to adjust conflicts when and as it wished. But this view has not prevailed, and the Court has therefore been forced to decide in many varied factual situations whether the application of a given state tax to a given aspect of interstate activity violates the Commerce Clause. **It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it.** Memphis Natural Gas Co. v. Stone, 1948, 335 U. S. 80, 87, 68 S. Ct. 1475, 1478, 92 L. Ed. 1832; Western Live Stock v. Bureau of Revenue, supra, 303 U. S. (250, at page 258, 58 S. St. (546), at page 550 (82 L. Ed. 823). And if a genuine separation of the taxed local activity from the interstate process is impossible; it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce.' Puget Sound Stevedoring Co. v. Tax Commission, 1937, 302 U. S. 90, 58 S. Ct. 72, 82 L. Ed. 68, in which the Court held that the act of loading or unloading of goods at the

beginning or end of an admittedly interstate or foreign act of transportation of a cargo is a part of the transportation itself and cannot be taxed by the State in which the act is done. The Court said: 'The business of appellant, insofar as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce. **Transportation of a cargo by water * * is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. * * The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts.** 302 U. S. at pages 92, 94, 58 S. Ct. at pages 73, 74." 123 N. E. 2d at 506, 507. Emphasis Supplied.

Petitioner, on page twenty of its brief, makes the point that the City allows Petitioner to transport "vast quantities" of gas, free of tax, through the City either to the distributor for resale or enroute to the City of Pensacola, Florida. In the first instance, even Petitioner would concede that sales to distributors for resale are interstate commerce and not subject to tax, and in the second, the tax is measured by gross receipts and none are realized upon the gas destined to Florida.

On the same page Petitioner contends that the Spector Motor Service, and Railway Express cases are not in point because they involve common carriers whereas United sells the gas it carries and its revenues are from sales and not from transporta-

tion. Although, undoubtedly, United computes some charge for transportation which it includes in the sale price of the gas, this Court held in State Tax Commission of Mississippi v. Interstate Natural Gas Co., Inc., supra, that Interstate Natural Gas Co., which both transported and sold its gas, was entirely engaged in interstate commerce. In Panhandle Eastern Pipeline Co. v. Public Service Commission, supra, at Page 513, this Court said:

> "Thus gas furnished to local utilities for resale is supplied unquestionably, both as to transportation and **as to sale**, in interstate merce." Emphasis supplied.

This was the holding in Mississippi River Fuel Corp. v. Hoffman, supra; Texas Gas Transmission Co. v. Atkin, 197 Tenn. 123, 270 S. W. 2d 348 (1954), cert. den. 348 U. S. 883 (1954); Gay v. United Gas Pipe Line Co., 159 Fla. 659, 32 So. 2d 600 (1947); and State v. Transcontinental Gas Pipe Line Corp., 123 So. 2d 172 (1960).

In Gay v. United Gas Pipe Line Co., Petitioner, which was on the other side of the fence with respect to a Florida gross receipts tax, persuasively and successfully urged that it was exclusively engaged, both as to sale and transportation, in interstate commerce. In State v. Transcontinental in which certiorari to the Supreme Court of Alabama was recently denied by this Court, the Alabama Court rejected the State's contention that Transcontinental, because it sold the gas it transported, was subject to the Alabama Franchise Tax, saying:

> ". . . The trial Court was of the opinion, and we are agreed, that commerce is not limited

> to transportation. In the language of the trial Court: 'Persons transporting their own product, gas, which they sell, can be, and are, engaged exclusively in interstate commerce'." 123 So. 2d at 177.

Finally, Petitioner urges that the decision of the Court of Appeals is in conflict with **McGoldrick v. Berwind-White, 309 U. S. 33, 84 L. Ed. 565 (1940)**, and **International Harvester v. Department of Treasury, 322 U. S. 340, 88 L. Ed. 1313 (1943)**. Neither of these cases involves a license as a precondition of doing business.

McGoldrick involved a sales tax imposed upon the purchaser of tangible goods for consumption. This Court was careful to point out the distinction between the McGoldrick situation and that of a case such as the one here of which the Court says, in Footnote 2, Page 45:

> "Privilege taxes requiring a percentage of the gross receipts from interstate transportation, or from other activities in carrying on the movement of that commerce, which, if sustained, could be imposed wherever the interstate activity occurs, have been struck down for similar reasons. * * * Taxation of articles in the course of their movement in interstate commerce is similarly foreclosed."

International Harvester involved a corporation which, while incorporated in Delaware, maintained extensive factories in Indiana and manufactured, sold and delivered the bulk of its goods in the State of Indiana. The International Harvester situation is in many ways similar to that of Memphis Gas

Company, in Memphis Gas Company v. Beeler, supra. In both of these cases the activities of taxpayer were sufficiently separable from the flow of interstate commerce to sustain the tax involved. This Court said, at Page 346:

> "The present tax to be sure is on the seller. But in each a local transaction is made a taxable event, and that event is separate and distinct from the transportation or intercourse which is interstate commerce."

One of the contentions of International Harvester had been that in some instances delivery was taken by out of state purchasers in Indiana and such purchasers had then shipped the goods so purchased out of state.

THIS COURT HAS PREVIOUSLY DEALT WITH TAXES OF THIS TYPE

This Court has, on many occasions, dealt with license and franchise taxes of various kinds and with taxes on gross receipts or gross revenues. The following is a partial list of such cases:

Alpha Portland Cement Co. v. Commonwealth of Massachusetts
268 U. S. 203, 68 L. Ed. 916 (1925);
Ozark Pipe Line Corp. v. Monier
266 U. S. 555, 69 L. Ed. 439 (1925);
Puget Sound Stevedoring Tax Commission
302 U. S. 90, 82 L. Ed. 68 (1937);
Freeman v. Hewitt, supra;
Joseph V. Carter & Weekes Stevedoring Co.
330 U. S. 442, 91 L. Ed. 993 (1947);
Railway Express Agency, Inc. v. Commonwealth of Virginia, supra.

Joseph v. Carter & Weekes Stevedoring Co. involved a privilege tax imposed by the City of New York by ordinance which is substantially the same as that imposed by the City of Mobile. In this case, both of the respondents were engaged in the general stevedoring business in New York City and this Court found that this consisted only of taking freight from a convenient place on the pier of lighter, wholly within the territorial limits of New York City; and storing it properly for safety, and for handling in or on the outgoing vessel alongside, or of similarly unloading a vessel on its arrival. The City of New York, acted under the purported authority of the local law which imposed a tax as follows:

> "for the privilege of carrying on or exercising for gain or profit within the City any trade, business, profession, vocation or commercial activity other than a financial business * * * Every person shall pay an excise tax which shall be equal to one-tenth of one per cent upon all receipts received in and or applicable to the City from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which such period shall commence * * *".

This Court called this a tax on the privilege of engaging in interstate commerce and found it "indistinguishable" from that involved in Puget Sound Stevedoring v. Tax Commission, supra. We submit that this tax, as well as that sought to be imposed by the State of Washington in the Puget Sound case are indistinguishable from the City of Mobile license tax in the instant case.

APPEAL OR CERTIORARI?

It has often been said of this Court that one of its problems is the consumption of its time with matters that are not of great national interest or importance by improper or improvident attempts upon the part of members of the Bar to obtain review by this Court of decisions of lower Courts simply because of dissatisfaction with such rulings. That there should be a difference of opinion between this Court and members of the Bar with regard to the relative importance of cases is natural, but it was the purpose of the Act of February 13th, 1925, to lighten this burden by enlarging the purely discretionary review by writ of certiorari and by restricting the cases which may be directly reviewed on appeal as a matter of right. To this end we have the present Section 1254, Title 28, United States Code, the pertinent portion of which is quoted above. **Frankfurter and Hart, 47 Harv. L. Rev. 245, 271, Moore v. Fidelity and Deposit Company, 272 U. S. 317, 71 L. Ed. 273 (1926).**

The effect of the filing of the petition for the writ of certiorari, hard on the heels of the filing of a notice of appeal in exactly the same case and involving precisely the same question, is to increase the workload of this Court.

We contend that Petitioner has already made its election concerning the method by which it seeks review by this Court when it filed its notice of appeal in the United States Court of Appeals for the Fifth Circuit. If this Court may be forced, at a short time later, to pass upon precisely the same questions, then the petition and this brief in opposition thereto are simply matters which waste the

time of this Court. We submit, therefore, that for this reason alone, this petition for writ of certiorari ought to be denied.

CONCLUSION

We respectfully submit that the decision of the Court of Appeals involved no new question and is not in conflict with the previous decisions of this Court. This Court has previously considered similar taxes on many occasions, and in addition the Petitioner has already elected to seek review by this Court by appeal rather than certiorari. The petition for the writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, S. Palmer Gaillard, Jr., one of the attorneys for Scott Paper Company, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of March, 1961, I served copies of the foregoing brief for Respondent in opposition on United Gas Pipe Line Company, Petitioner herein, by mailing copies in duly addressed envelopes with first class postage prepaid, to its respective attorneys of record, as follows:

E. DIXIE BEGGS
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P. O. Box 1351
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Mobile, Alabama

S. PALMER GAILLARD, JR.

APPENDIX "A"

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NO. 18,118

SCOTT PAPER COMPANY,
Appellant,

v.

UNITED GAS PIPE LINE COMPANY,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I.

Notice is hereby given that United Gas Pipe Line Company, appellee in the above styled cause, hereby appeals to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Fifth Circuit originally dated September 2, 1960, and thereafter entered on November 16, 1960, (rehearings denied on October 5 and November 16, 1960) reversing the judgment of the United States District Court for the Southern District of Alabama dated September 25, 1959.

This appeal is taken pursuant to 28 U.S.C.A. § 1254, paragraph (2).

II.

The clerk will please prepare a transcript of the record in this cause, for transmission to the clerk of the Supreme Court of the United States, and in-

clude in said transcript the following:

The original printed record in this Court

Argument and submission

Opinion of the Court

Judgment

Petition for rehearing and brief in support

Opinion on rehearing

Order denying rehearing

Second petition for rehearing and brief in support

Opinion-order denying second petition for rehearing

Motions by appellee to further stay mandates and to fix effective dates of judgment

Order of December 27, 1960, staying mandates and fixing effective date of judgment

This notice of appeal

III.

The following questions are presented by this appeal:

(1) Does the commerce clause of the Federal Constitution immunize an interstate pipe line company making direct sales of gas to industrial consumers in the City of Mobile from a city license tax on the privilege of conducting that business in the City?

(2) Is a license tax on the privilege of selling natural gas the equivalent of a tax on the preceding

interstate delivery or transportation of the gas?

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I, E. Dixie Beggs, one of the attorneys for United Gas Pipe Line Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of January, 1961, I served a copy of the foregoing notice of appeal to the Supreme Court of the United States on the appellee, Scott Paper Company, by mailing the same in a duly addressed envelope,

with first-class postage prepaid, to its attorneys of record as follows:

MESSRS. GAILLARD, GAILLARD & SMITH
Annex, First National Bank Building
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(Attention: Mr. Hardy B. Smith)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 51

UNITED GAS PIPE LINE COMPANY,
Petitioner,

vs.

IDEAL CEMENT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION.

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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. .....

UNITED GAS PIPE LINE COMPANY,
Petitioner,

vs.

IDEAL CEMENT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION.

Respondent, Ideal Cement Company, respectfully says that the petition for writ of certiorari should be denied.

SUMMARY STATEMENT OF REASON FOR DENIAL OF THE WRIT.

The Court of Appeals for the Fifth Circuit has held that the ordinance of the City of Mobile, Alabama under consideration imposes a tax on the privilege of engaging in business, that Petitioner is engaged solely in interstate

commerce in Mobile, Alabama and that the tax as it applies to Petitioner is inapplicable because it would be a tax on the act or privilege of engaging in interstate commerce. It is admitted by Petitioner that the transaction between Petitioner and Respondent is one in interstate commerce, and this being true, the case falls clearly under the many decisions of this Court, that a State or municipality cannot lay a tax on the act or privilege of engaging in interstate commerce.

PETITIONER'S STATEMENT OF THE CASE IS NOT ENTIRELY ACCURATE.

There are certain inaccuracies in Petitioner's "Statement of the Case", which Respondent wishes to point out.

The basic question presented, as stated by Petitioner, is correct but should be more simply paraphrased as follows: Can a state or municipal government levy a direct tax on the act or privilege of engaging in interstate commerce without violating the Commerce Clause of the United States Constitution?

Petitioner wrongfully states that as a result of Respondent's defense of the suit by Petitioner on the ground that the reimbursement obligation of Respondent is limited to taxes validly imposed, "Petitioner was forced into the unique position of contending for, instead of against, the validity of a heavy tax levied upon it". Petitioner was notified prior to its payment of the tax to the City of Mobile that Respondent considered the tax unconstitutional and denied any liability for same. United could have taken the same position as Respondent and contended against the tax when imposed by the City of Mobile, but it elected to voluntarily pay the tax as if valid and sue Ideal for reimbursement. It is interesting to note that Petitioner has recently filed suit in the United States District Court for the Southern District of Ala-

bama against the City of Mobile for $185,785.04 to recover license taxes paid by it over the past 5 years under the ordinance of the City of Mobile in question in the instant case. It is suggested that Petitioner will not advocate that it's position in the District Court case is unique.

Petitioner states that "there is no claim (by Ideal) that the tax is discriminatory against interstate commerce . . . ." While it is not exactly clear what Petitioner means by this statement, Respondent's main contention in the case is, and has been since the start, that the tax in question is invalid in its attempted application to Respondent as violating the commerce clause of the U. S. Constitution.

Respondent disagrees with the unsupported statement of fact by Petitioner that, "Had the gas reached any of these other customers (industrial, commercial and domestic) the license tax would have applied to the sale . . . ." Petitioner is attempting here to place direct sales by an interstate pipeline company in the same category as sales by a local distributor to its customers of gas it has purchased from an interstate pipeline company, and this Petitioner is incorrect in doing.

Petitioner would make much ado over the fact that it employs a local gas company, Mobile Gas Service Corporation, to complete its delivery to Respondent. In other words, United subcontracts, so to speak, certain of the obligations which it has assumed in its contract to sell direct to Respondent, but this has no bearing on the instant case. This is especially so as Respondent is not a part of, nor does it have any interest in, said contract.

The activities carried on in the State of Alabama and the City of Mobile with respect to the sale and delivery of the natural gas to Respondent are, as numerous cases point out (to name a few, **Panhandle Eastern Pipe Line Co. v. Public Service Commission**, 92 L. Ed. 136, 322 U. S. 507; **State Tax Commission of Mississippi v. Interstate**

Natural Gas Co., Inc., 76 L. Ed. 156, 284 U. S. 414, plainly incident to the interstate commerce, and, if this be true, it is then immaterial whether Petitioner performs these incidental activities which a sale and delivery of gas to Respondent or any other party would always necessitate or whether it contracts these incidental activities to Mobile Gas Service Corporation.

The case is clearly analogous to one of interstate rail or motor transportation where local transportation (i. e., shipment from one point to another in a state by an agency operating entirely within the limits of a state) is still considered as interstate commerce. In order for such local transportation of goods to constitute interstate or foreign commerce, there must be such continuity of movement as to show that shipment to the ultimate destination was within the original contemplation of the shipper and that stoppage or change of carriers is merely incidental to the shipment. **United States v. Erie R. R. Co.**, 280 U. S. 98, 74 L. Ed. 190; See annotation 74 L. Ed. 190; 11 Am. Jur. 61, Commerce, Sec. 65.

Certainly there is no question in our case but that Petitioner contemplated that the destination of the gas was at the plant site of Respondent (the contract itself is conclusive evidence of this) and that the employment of Mobile Gas Service Corporation to deliver this gas in the City of Mobile to Respondent through its pipes, i. e., the change of carriers, is merely incidental to the shipment. Mobile Gas Service Corporation does absolutely nothing but that which Petitioner would itself have to do in the direct sale by it to Respondent if it did not have its arrangement with Mobile Gas Service Corporation.

The conclusion reached by the Court of Appeals in its per curiam opinion after Petitioner's second petition for rehearing that the City of Mobile tax is valid as to the 2c per Mcf. of United's sales price retained as compensation

by its agent, Mobile Gas Service Corporation, but not so as to the remaining gas received by Petitioner, is not unsupportable as suggested by Petitioner. Mobile Gas Service Corporation is a local corporation engaged exclusively, as far as its own business is concerned, in intrastate commerce. Its gross receipts from the sale or distribution of natural gas are subject to tax.

PETITIONER'S STATEMENTS AS TO THE REASONS FOR GRANTING THE WRITS ARE NOT ACCURATE

The question of federal law here involved has without question been settled by this Court. It is now well recognized that a tax on the act or privilege of engaging in exclusive interstate commerce is unconstitutional as placing an undue burden on such interstate commerce, i. e., it violates the commerce clause of the United States Constitution, and the Court of Appeals decision is in line with these recognized authorities.

Petitioner, in saying that the question of federal law involved has not been decided as to the natural gas industry, would apparently have this Court make a separate determination for every known business, which of course, would be a waste of this Court's time and energies. The language of this Court expressed on many occasions, as for example in the case of **Northwestern States Portland Cement Company v. Minnesota**, 3 L. Ed. 421, 358 U. S. 450 (1958) when Justice Clark wrote: "Moreover, it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce", clearly applies to the natural gas industry as well as any other.

ARGUMENT

Petitioner, in its petition, has quoted from or discussed eight cases and the Natural Gas Act which it contends support its position and Respondent, at the outset, and before affirmatively supporting the correctness of the Court of Appeals decision, will discuss and distinguish each of these authorities on which Petitioner relies.

On page 9 of its brief, Petitioner says that the Court of Appeals has ignored without any explanation or distinction, applicable decisions of the United States Supreme Court upholding state taxation and regulation of direct sales by interstate pipe line companies, and it concludes, on the basis of this erroneous statement, that if sales of natural gas may be taxed by the states without infringement of the commerce clause, such sales should also be taxable by municipalities. If sales such as are involved in our case were subject to taxation by the States, we would readily agree with Petitioner's conclusion that they would also be taxable by municipalities. The truth is, however, that such sales are not taxable even by a state and his quote from the case of **Memphis Gas Company v. Beeler**, 315 U. S. 649, 86 L. Ed. 1090, is clearly not applicable in our case when the full report of the Beeler case is read. The following facts were present in the Beeler case but are not present in the instant case:

1. Taxpayer managed its entire business in Memphis, Tenn., where it kept its accounts, provided for the payroll of employees on its line in other states as well as Tennessee and sent out bills for gas delivered in other states as well as Tennessee. As stated by Mr. Chief Justice Stone, "It has thus established a commercial domicile in Tennessee by virtue of which it is subject to taxation . . ."

2. The Tennessee tax in question is apparently an income tax on profits as opposed to a tax on the privilege of engaging in business.

3. Taxpayer delivered more than 80% of its gas to a local distributing company which sold the gas to local consumers under a contract with taxpayer which the Supreme Court of Tennessee found to be a joint adventure between the taxpayer and distributing company. The Supreme Court of Tennessee further held that the sales made by these partners or joint enterprisers was not interstate commerce. It is interesting to note that the taxpayer asked for a modification of the Supreme Court of Tennessee decree on the ground that some of taxpayer's income subject to tax was derived from certain sales to the distributing company not under the joint adventure agreement and to other companies, which it insisted were concededly sales interstate commerce. The Court rejected the contention upon the ground that taxpayer had failed to show what portion, if any, of the taxed profits were derived from such sales and therefore taxpayer had laid no basis for an injunction restraining collection of that part of the tax. The inference is clear that the interstate sales, as opposed to those in concert with the local distributor under a joint adventure, would have been immune from taxation.

This Court, in a footnote to Mr. Justice Burton's opinion in **Spector Motor Service v. O'Connor**, 95 L. Ed. 573, 340 U. S. 602, said as follows concerning the effect of the decision in the **Memphis Natural Gas Company v. Beeler** case, supra, on the situation in the **Spector** case (which, by the way, is one of the principal cases on which Respondent Ideal relies), viz.:

"The decision in **Memphis Natural Gas Co. v. Beeler**, 315 U. S. 649, 86 L. Ed. 1090, 62 S. Ct. 857, upheld a Tennessee tax on earnings of the taxpayer within that State where the earnings were derived from the interstate dis-

tribution of gas by the taxpayer in a joint enterprise with the Memphis Power & Light Company. Any suggestion in that opinion as to the possible validity of such a tax if applied to earnings derived wholly from interstate commerce is not essential to the decision in the case."

As for the case of **Pennsylvania Gas Co. v. Public Service Commission**, 64 L. Ed. 434, 252 U. S. 23, Respondent readily admits that there is a line of cases, of which **Pennsylvania Gas** is one, which hold, and rightly so, that the interstate sale of natural gas to industrial consumers is subject to local **regulation** imposed under the authority of the police power of the local governing body, state or municipal. These regulation cases employ such terms as "local characteristic", "essentially local", and the like in describing the sale or delivery of gas to local consumers and it is obvious that Petitioner seeks to confuse the Court by citing regulation cases and employing the language and reasoning of these regulation cases to a tax case as here involved.

There is a definite distinction between the power to regulate and the power to tax which this Court recognized, however, and it can be said with certainty, that the power to regulate does not necessarily carry with it the power to tax. The distinction is discussed in the case of **Freeman v. Hewitt**, 329 U. S. 249, 91 L. Ed. 265, when this Court said:

> ". . . but, in the necessary accomodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress choses to enact a nation-wide rule, the power will not be denied to the State. **Minnesota Rate Cases**

(Simpson v. Shepard), 230 U. S. 352, 402 et seq., 57 L. Ed. 1511, 1542, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18; **South Carolina State Highway Dept. v. Barnwell Bros.**, 303 U. S. 177, 82 L. Ed. 734, 58 S. Ct. 510; **Union Brokerage Co. v. Jensen**, 322 U. S. 202, 209 212, 88 L. Ed. 1227, 1232 1234, 64 S. Ct. 967, 152 A. L. R. 1072. State taxation falling on interstate commerce, on the other hand, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. But revenue serves as well no matter what its source. To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function. Moreover, the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations. The power to tax is a dominant power over commerce. Because the greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a state of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce. . . ."

The distinction between the two is also recognized in 51 Am. Jur., Taxation, Section 68, as follows:

"They are both distinct, coexistent powers in the State. Broadly speaking, the distinction is that the taxing power is exercised for the purpose of raising revenue and is subject to certain designated constitutional limitations, while the police power is exercised for the promotion of the public welfare by means of the regulation of dangerous or potentially dangerous

businesses, occupations or activities and is not subject to the constitutional restrictions applicable to the taxing power."

Thus a state or municipality may within its police power, have the authority to regulate (i. e., to establish rates, impose safety regulations and the like) the sale of natural gas from without the state to an industrial consumer within the state when in the local interest and not otherwise specifically regulated by Congress itself even though this regulation may indirectly affect interstate commerce. As pointed out above, however, there is a difference between regulation and taxation and regardless of the right to regulate, there can be no state or local tax on the act or privilege of engaging in interstate commerce as such, as the authorities hereinafter cited will clearly point out. Respondent submits, therefore, that the **Pennsylvania Gas Co.** case, supra, relied upon by Petitioner deals with regulation instead of taxation and hence is inapplicable to this case.

The cases of **Panhandle Eastern Pipe Line Co. v. Public Service Commission**, 332 U. S. 507, 92 L. Ed. 136; **Panhandle Pipe Line Co. v. Michigan**, 341 U. S. 329, 95 L. Ed. 993 and **United States v. Public Utilities Commission**, 345 U. S. 295, 97 L. Ed. 1020, also quoted from by Petitioner, are likewise regulation cases and subject to the same distinguishment as the **Pennsylvania Gas Co.**, case, supra. A reading of these cases; if not the quotations in Petitioner's brief themselves, clearly shows this to be true. Therefore, in citing the **Panhandle Eastern** case, supra, on page 12 of its brief as authority for the statement that, "It is now well established that such sales, although a part of interstate commerce, are nevertheless sufficiently local in aspect to support state regulation and taxation". Petitioner is in deliberate error as far as taxation is concerned.

We should mention briefly the Natural Gas Act (15 U. S. C. A., Sec. 717) of June 21, 1938, as reference to

same appears in a number of the regulation cases cited by Petitioner and as Petitioner makes reference to this act in its brief. By this act, Congress gave the Federal Power Commission power to **regulate** rates and all other aspects of sale of gas in interstate commerce to purchasers for resale to ultimate public consumers, whether they be domestic, commercial, industrial or otherwise, the purchasers being in general local public utility companies. Thus, now a state cannot regulate any feature of these sales because they are taken over by a Federal authority.

The Natural Gas Act, however, did not attempt to **regulate** direct sales for consumptive use (such as sales from Petitioner to Respondent) and such sales were expressly excluded from the application of the Act. The cases therefore hold, and again rightly so, that this field of regulation, i. e., regulating direct sales for consumptive use, has been left to the States, provided of course the state regulation does not unduly discriminate against interstate commerce.

Illinois Natural Gas Co. v. Central Illinois Public Service Commission, 314 U. S. 498, 86 L. Ed. 371; **Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission**, 95 L. Ed. 995, 341 U. S. 329.

It is important to note, however, that in none of the cases interpreting the Natural Gas Act is it ever stated that the States have a power to tax the interstate commerce (as opposed to regulate—the difference being more fully discussed above). See **Mississippi River Fuel Corporation v. Hoffman**, 123 N. E. 2d 503, certiorari denied, 349 U. S. 935.

It is clear from a reading of the case of **East Ohio Gas Co. v. Tax Commission**, 283 U. S. 465, 75 L. Ed. 1171, relied on by Petitioner, that the issue involved was not whether a particular tax placed an undue burden on interstate commerce but whether the taxpayer was engaged in

interstate or intrastate commerce. It was held by this Court, after a consideration of the fact situation involved (which, by the way, has no similarity to the instant case), that taxpayer was engaged in intrastate commerce and hence the tax, which was based on the privilege of engaging in intrastate commerce, was valid.

The Court, in its opinion, however, did state the well recognized law that a state cannot levy a tax on the act of engaging in interstate commerce.

It should be noted that in the instant case, Petitioner admits that the sale of gas from it to Respondent is one in interstate commerce. It is obvious that in order for the Court of Appeals to rule as it did, Respondent had the burden of proving two things, viz.: not only that the tax in its application to Respondent is one on the act or privilege of engaging in interstate commerce and hence void, but also, and first of all, that the transaction between Petitioner and Respondent was one in interstate commerce.

As for the question of whether this is interstate commerce, the Court of Appeals found—and the Petitioner has admitted—that it is. In summing up its findings on this point, the Court of Appeals, speaking through Chief Judge Reyes, said:

> "'We find, however, that the reductions in gas pressure prior to delivery to Scott and Ideal are not sufficiently 'realistic' changes to separate the gas from the flow of interstate commerce as it crosses into the jurisdiction of the City of Mobile.
>
> "In the course of its argument Appellee (Petitioner here) (parenthesis supplied) concedes that sales of gas to industrial consumers in the circumstances of this case are interstate commerce . . ."

This concession by Petitioner is further readily evident from a reading of its petition for writ of certiorari presently before this Court.

The **McGoldrick v. Berwind-White Co.** case, 309 U. S. 33, 84 L. Ed. 565, is not controlling in any way on the instant case because it involved a sales tax instead of a license or privilege tax as is imposed by the City of Mobile and the **McGoldrick** case tax was levied on the purchaser for consumption instead of on the seller. As the Court pointed out, "Only in event that the seller fails to pay over to the city the tax collected or to charge and collect it as the statute requires, is the burden cast on him".

The last of the cases cited by Petitioner in support of its petition for writ of certiorari is that of **International Harvester Co. v Department of Treasury**, 322 U. S. 340; 88 L. Ed. 1313, and it involved the constitutionality, which was upheld by this Court, of the Indiana Gross Income Tax Act of 1933. Petitioner in attempting to rely on this case, would mislead this court on page 16 of its brief, when it says:

> "Likewise, the interstate transportation was reflected in the gross receipts from the sale of goods brought into Indiana in **International Harvester Co. v. Department of Treasury**, 322 U. S. 340 (1944). This Court upheld 'a privilege tax upon the receipt of gross income' on direct sales completed in the state in the following language:".

(after which Petitioner quotes a paragraph from the case). This Court did not characterize the tax in the **International Harvester** case as a "privilege tax upon the receipt of gross income" as Petitioner suggests. On the contrary, this quote appeared only once in the **International Harvester** case, and in the following context:

> "The gross income tax collected on those transactions (i. e., those transactions under consideration in the **International Harvester** case) (parenthesis supplied) is the same one which was before this Court in **Department of Treasury v. Wood Preserving Corp.**, 313 U. S. 62, 85 L. Ed. 1188, 61 S. Ct. 885, and **J. D.**

Adams Mfg. Co. v. Storen, 304 U. S. 307, 82 L. Ed. 1365, 58 S. Ct. 913, 117 A. L. R. 429. The tax was described in the **Storen** case as **'a privilege tax upon the receipt of gross income,'** 304 U. S., p. 311. In that case an Indiana corporation which manufactured products and maintained its home office, principal place of business and factory in Indiana sold those products to customers in other States and foreign countries upon orders taken subject to approval at the home office. It was held that the Commerce Clause (Art. 1, Section 8 of the Constitution) was a barrier to the imposition of the tax on the gross receipts from such sales. But as we held in the **Wood Preserving Corp.** case, neither the Commerce Clause nor the Fourteenth Amendment prevent the imposition of the tax on receipts from an intrastate transaction even though the total activities from which the local transaction derives may have incidental interstate attributes. The objections under the Commerce Clause and the Fourteenth Amendment to the tax on the receipts from the three classes of sales involved here are equally without merit."

Thus this Court in the **International Harvester** case once again recognized that a tax on the privilege of engaging in interstate commerce is invalid even though it upheld a gross income tax on intrastate activities.

This ends the discussion of the cases cited by Petitioner.

As for affirmatively supporting the correctness of the Court of Appeals decision, it can be done very briefly.

In the first place, it is admitted by Petitioner (and was admitted even before the Court of Appeals made its finding to this effect) that the sale from it to Respondent is a sale in interstate commerce, despite the so-called local activities carried on by Petitioner's agent, Mobile Gas Service Corporation. (It is not Petitioner's contention that the "local activities" alter the interstate character of the

transaction but merely that they support the tax.) It is therefore unnecessary to cite the numerous cases which substantiate this fact.

In determining whether or not the tax in question places an undue burden on such interstate commerce, the classification of the tax is important, and Respondent went to some length in the Court of Appeals to show that the license imposed by the City of Mobile on gas companies is certainly one on the right or privilege of engaging in the business of selling or distributing natural gas. The Court of Appeals was in agreement, which agreement it expressed as follows: "If these deliveries to Scott and Ideal within the City of Mobile are part of the flow of interstate commerce, the ordinance is inapplicable, for it would be a tax whose payment is a precondition to exercising the privilege of engaging in interstate commerce . . ." Even Petitioner admits this is a privilege tax as it states on page 17 of its brief, "The tax is on the privilege of making the local sale, not the interstate delivery" (a statement which Respondent agrees with only as to the classification of the tax).

It is now well settled that a state or municipal body cannot lay a tax on the act or privilege of engaging in interstate commerce. This is so well settled that the Court of Appeals determined that the crucial question to be decided was whether the gas was moving in interstate commerce when it entered the City of Mobile, and as for the law on the question of the constitutionality of the City of Mobile privilege tax as it applied to Respondent, the Court of Appeals had only the following comment:

> "If these deliveries to Scott and Ideal within the City of Mobile are part of the flow of interstate commerce, the ordinance is inapplicable, for it would be a tax whose payment is a precondition to exercising the privilege of engaging in interstate commerce **'and that avenue of approach' had long been declared unavailable under the commerce clause. Northwestern**

Cement v. Minnesota, 1959, 358 U. S. 450, 464; See **Spector Motor Service v. O'Connor**, 1951, 340 U. S. 602; **Underwood Typewriter Co. v. Chamberlain**, 1920, 254 U. S. 113, 119."

There are numerous other cases as well in which this is made clear. To cite a few: **Ozark Pipe Line Corporation v. Monier**, 69 L. Ed. 439, 266 U. S. 555; **Puget Sound Stevedoring Co. v. State Tax Commission**, 82 L. Ed. 68, 302 U. S. 90; **State Tax Commission of Mississippi v. Interstate Natural Gas Co., Inc.**, 76 L. Ed. 156, 284 U. S. 41; **Gay v. United Gas Pipe Line Company**, 32 S. 2d 600; and **United Gas Pipe Line Co. v. Lee**, 17 S. 2d 553. (The last two cases, being the same case appearing before the Supreme Court of Florida on two occasions, are particularly interesting as they involve United Gas Pipe Line Company, Petitioner here, represented by the same counsel, taking in effect the opposite position from its contentions in the instant case and winning.)

Petitioner has briefly attempted to distinguish the **Spector** case, supra, and **Railway Express Agency v. Virginia**, 347 U. S. 359, 98 L. Ed. 757, on the ground that they involved common carriers engaged in transporting the property of others instead of its own property. This contention is a little confusing in view of Petitioner's admission otherwise that the transaction between Petitioner and Respondent is one in interstate commerce. It is of no consequence, however, as it is clear from the cases that persons transporting their own product, gas, which they sell and deliver, can be, and are, engaged exclusively in interstate commerce. In **Mississippi River Fuel Corporation v. Hoffman**, supra; **Texas Gas Transmission Corp. v. Atkins**, 197 Tenn. 123, 270 S. W. 2d 384, certiorari denied, 348 U. S. 883, 99 L. Ed. 694; **Gay v. United Gas Pipe Line Company**, supra; and **Panhandle Eastern v. Public Service Commission**, supra, it was held that gas companies which transported natural gas which was owned by them, which

was sold to local utilities for resale and to industrial users for consumption, were engaged solely in interstate commerce.

Lastly, Petitioner has suggested that the tax in question is on the privilege of making the local sale, not the interstate delivery. In this statement, Petitioner is certainly confused. The transaction between Petitioner and Respondent is based on a contract between the two under which Respondent purchases gas at its plant site from Petitioner, which gas is delivered by Petitioner from without the State. This is clearly a sale in interstate commerce.

CONCLUSION.

Petitioner is engaged in exclusive interstate commerce in Alabama, the sale from Petitioner to Respondent is a sale in interstate commerce, the tax in question, as it applies to Petitioner, is a tax on the act or privilege of engaging in interstate commerce and such a tax, in such application, is unconstitutional as violative of the Commerce Clause of the United State Constitution.

The petition for certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I, Marion R. Vickers, one of the attorneys for Ideal Cement Company, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1961, I served copies of the foregoing Brief of Respondent in Opposition on United Gas Pipe Line Company, Petitioner herein, by mailing the same in duly addressed envelopes, with first postage prepaid, to its attorneys of record as follows:

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SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAR 15 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1960.

No. 35

UNITED GAS PIPE LINE COMPANY,
Petitioner,
vs.
IDEAL CEMENT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

SUPPLEMENT TO BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1960.

No.

UNITED GAS PIPE LINE COMPANY,
Petitioner,
vs.
IDEAL CEMENT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

SUPPLEMENT TO BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent, IDEAL CEMENT COMPANY, respectfully says that the petition for writ of certiorari should be denied because it was not timely filed.

SUMMARY STATEMENT OF REASON FOR FILING SUPPLEMENTAL BRIEF

As a supplement to the brief of Respondent in opposition to the petition for writ of certiorari, which said brief in opposition was filed in this Court on, to-wit, March 13, 1961, Respondent wishes to raise a jurisdictional question omitted from its original brief.

JURISDICTIONAL QUESTION INVOLVED

On September 2, 1960, the United States Court of Appeals for the Fifth Circuit rendered its original opinion in this case reversing the judgment in favor of Petitioner by the United States District Court for the Southern District of Alabama (reported at 282 F. 2d 574). Within twenty-one (21) days from the entry of the judgment, Petitioner filed its first petition for rehearing which was denied by the Court of Appeals on October 5, 1960, in its per curiam opinion reported at 282 F. 2d 580. On October 20, 1960, Petitioner filed in the Court of Appeals an application for leave to file a second petition for rehearing, a copy of which application is appended.

The pertinent portion of Rule 19 of the Rules of the United States Court of Appeals for the Fifth Circuit provides as follows:

> "A petition for rehearing may be presented only within 21 days after entry of judgment, unless by special leave granted by the Court, or one of the Judges . . ."

The first petition for rehearing was admittedly filed within the 21 day period allowed by Rule 19. The application for leave to file a second petition for rehearing was not filed until approximately 47 days after entry of the judgment and there was never issued by the Court of Appeals or any of its Judges an order granting the motion for leave to file a second petition for rehearing. This fact has been verified with the office of the Clerk of the Court of Appeals for the Fifth Circuit.

The Court of Appeals did, however, in denying

the second petition for rehearing, write a two paragraph per curiam opinion which is reported at 282 F. 2d 580, a copy of which is appended.

In addition to the above, Petitioner also filed in the Court of Appeals on, to-wit the 21st day of December, 1960, a "motion by appellee to further stay of mandates and to fix effective date of judgments". It has been confirmed with the office of the Clerk of the Fifth Circuit Court of Appeals that an order granting the motions was entered by the Court on December 27, 1960, and the effective date of its judgment in this case was declared to be November 16, 1960, the date on which the second petition for rehearing was denied.

It is well settled that a Court cannot take action which amounts to allowing appeals or petitions for writs of certiorari to be initiated outside the time limit prescribed by statute or applicable rules, the reason being that the timeliness of appellate action is jurisdictional. **George vs. Victor Talking Machine Company**, 293 US 377, 79 L. Ed. 439. Therefore, the mere fact that the Court of Appeals granted an order fixing the effective date of its judgment as November 16, 1960, is not controlling if the petition for second rehearing was not timely filed. In such a case, the Court of Appeals would be powerless to extend the effective date of its judgment beyond October 5, 1960, the date the first petition for rehearing — which was timely filed — was denied.

The fact that the Court of Appeals wrote brief opinion after the filing of the application for leave to file a second petition for rehearing does not of itself extend the effective date of the judgment

for the reason that the Court, in its opinion of November 16, 1960, did not disturb, revise or alter in any way its decision which by its prior judgment has been plainly and properly settled with finality. In no was does the contents of the second per curiam opinion affect the matter sought to be reviewed by Petitioner in its petition for certiorari. The second per curiam opinion is an immaterial clarification which does not change the judgment previously rendered and which does not extend the affective date of judgment. See **Federal Trade Commission vs. Minneapolis-Honeywell Co.**, 344 US 206, 97 L. E. 245.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied on a jurisdictional basis because it was not timely filed.

Respectfully submitted,

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Of Counsel

CERTIFICATE OF SERVICE

I, MARION R. VICKERS, one of the attorneys for IDEAL CEMENT COMPANY, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of March, 1961, I served copies of the foregoing supplement to the brief of Respondent in opposition on United Gas Pipe Line Company, Petitioner herein, by mailing the same in duly addressed envelopes, with first class postage prepaid, to its attorneys of record as follows:

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NO. 18,103

IDEAL CEMENT COMPANY,

Appellant,

vs.

UNITED GAS PIPE LINE COMPANY,

Appellee.

No. 18,118

SCOTT PAPER COMPANY,

Appellant,

vs.

UNITED GAS PIPE LINE COMPANY,

Appellee.

Appeals from the United States District Court for The Southern District of Alabama

APPLICATION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

Appellee United Gas Pipe Line Company, respectfully requests leave to file its second petition for rehearing. Twenty copies of the printed petition with supporting brief are filed herewith.

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I hereby certify that copies of the foregoing application for leave to file a second petition for rehearing were this day served by mail on the following:

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Mr. William H. Burton, Legal Division
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Montgomery, Alabama.

I further certify that copies of the printed petition for rehearing and of the brief in support are being served by mail on the above listed attorneys by the printer, E. S. Upton Printing Company of New Orleans.

This 20th day of October, 1960

/s/ E. DIXIE BEGGS
Of Counsel for Appellee

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18103

IDEAL CEMENT COMPANY,

Appellant,

versus

UNITED GAS PIPE LINE COMPANY,

Appellee,

No. 18118

SCOTT PAPER COMPANY,

Appellant,

versus

UNITED GAS PIPE LINE COMPANY,

Appellee,

Appeals from the United States District Court for The Southern District of Alabama.

(November 16, 1960)

ON SECOND PETITION FOR REHEARING.

Before RIVES, Chief Judge, and JONES and WISDOM, Circuit Judges.

PER CURIAM: To clear up any ambiguity which may remain in our opinion and holding, we intended to hold and do hold that the Mobile City license tax is inapplicable as to gross receipts for the gas distributed by United directly to Ideal and Scott. In our opinion, however, the tax is applicable to the gross receipts of the local distributor, Mobile Gas Service Corporation.

United properly reimbursed Mobile Gas for the increased taxes paid by Mobile Gas on account of distributions to Ideal and Scott pursuant to United's contract with Mobile Gas.

The second petition for rehearing is

DENIED.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

Nos. 721 and 778

UNITED GAS PIPE LINE COMPANY,
Petitioner-Appellant,

v.

IDEAL CEMENT COMPANY,

and

SCOTT PAPER COMPANY,
Respondents-Appellees

No. 721, ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 778, ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER-APPELLANT, UNITED GAS PIPE LINE COMPANY

Scope of Brief

The petitioner-appellant, United Gas Pipe Line Company, submits this as a combined brief in reply to the briefs of the respondents in opposition to certiorari

(case No. 721) and the motions of the same parties as appellees (case No. 778) to dismiss or affirm.

We would remind the Court that United is in the unique position of a taxpayer who is urging the validity of a tax levied on it. United occupies this position, first, because it here seeks contractual reimbursement from two of its customers for taxes already paid, and second, because it believes the tax is constitutional and is also equitable in that it falls alike on the interstate and intrastate sellers of natural gas to the ultimate consumer.

Concerning Jurisdiction

We have pursued the necessary procedural steps for a review either by certiorari or appeal. We urge that the importance of the question presented is such that the case should be considered on its merits. Whether this is done by certiorari or appeal is of no great moment.

Neither Ideal nor Scott questions jurisdiction to review by certiorari but both contend that an appeal will not lie. It is nevertheless felt that appeal is the more appropriate route.

In *City of Detroit* v. *Murray Corp.* 355 U.S. 489 (1958), the Court of Appeals held the city and county tax ordinances involved were inapplicable to the property of the plaintiffs because of governmental immunity under the federal constitution, without passing upon the "total unconstitutionality" or validity of the ordinances under attack. Appellants sought review both by certiorari and appeal and this Court held that appeal was proper under 28 USC 1254 (2).

In *City of Chicago* v. *Atchison, T. & S. F. Ry.*, 357 U.S. 77 (1958), the Court of Appeals held the city ordinance requiring a certificate of convenience and

necessity did not apply to the railroad terminal company because it was repugnant to the commerce clause of the federal constitution. The validity *vel non* of the ordinance itself was not involved, but only the validity of its application to a particular party. This Court was given the opportunity to review either by certiorari or appeal under 28 USC 1254 (1) and (2) and held that the case was properly before it on appeal and denied certiorari.

Respondent Scott in case No. 721 argues that the filing of a notice of appeal constituted an election of remedy and precluded "the filing of a petition for the writ of certiorari hard on the heels of the filing of the notice of appeal." Numerous cases, however, including the two just discussed, illustrate that in similar situations the party seeking review has been permitted to "knock on both doors" and this Court has at the appropriate time determined which was the proper one to open, the one labelled certiorari or the other labelled appeal.[1]

Respondent Ideal in case No. 721 filed a supplement contending that the petition for certiorari was not timely filed because the time that elapsed between the original opinion and the *second* petition for rehearing exceeded the 21 days allowed by Rule 19 of the Court of Appeals for petitions for rehearing generally. However, the second petition was filed only 15 days after the opinion on the first petition for rehearing and was directed to the errors and omissions of that opinion. The second petition could not possibly have been filed until the Court's action on the first petition was known.

Ideal overlooks the holding of the Fifth Circuit that

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[1] See *Bradford Electric Light Co., Inc.* v. *Clapper*, 284 U.S. 221 (1931), involving this very question of "election" under the predecessor statute.

while its rules do not contemplate a second petition for rehearing, it will for good cause allow one to be filed and consider it on the merits. In such a case this Court has allowed review on the merits. *Sun Oil Co. v. Burford*, 130 F2d 10 (CA 5, 1942), reversed on other grounds 319 U.S. 315, rehearing denied 320 U.S. 214. Our second petition for rehearing was in fact accepted and considered on its merits by the Court of Appeals. The Court thereupon modified its previous opinions so as to affirm in part the District Court judgments theretofore reversed in toto, holding for the first time that United was entitled to recover from the respondents the amounts reimbursed to United's agent, Mobile Gas Service Corporation, for taxes paid by the latter (which incidentally impeaches the view of the Court of Appeals that the tax is on the flow of commerce). The Court order of November 16, 1960, is itself headed "*On* Second Petition for Rehearing" which, of course, means that the petition was accepted and considered on its merits. Moreover, all doubt is dispelled by the order of the Court of Appeals of December 27, 1960, fixing the effective date of its judgment of reversal as November 16, 1960, the date of the denial of the second petition for rehearing.

The Precise Question Presented

The appellees-respondents have not come to grips with the specific question presented. They deal in generalities with the established principle that states and municipalities may not tax the flow or very process of interstate commerce. This we recognize as established law but it is not involved here. They also repeatedly assert that the direct sale of natural gas by an interstate pipe line company to industrial consumers is interstate commerce. Again we have no quarrel where the nature of the whole of the transaction is

being described." This Court has so characterized such sales.[2]

The question here presented is whether the Mobile privilege tax is levied on an aspect or activity sufficiently apart from the very flow of commerce, and sufficiently localized within the city of Mobile, to lie outside the proscription of the commerce clause.

Stated another way, the question is whether the commerce clause denies a municipality the right to tax an interstate seller for the privilege of completing sales in the city where the seller itself delivers the commodity to the local consumer through seller's permanently maintained facilities in the city, and also services the delivery and collects the purchase price through a local office and local representatives within the city.

ARGUMENT

Respondents-Appellees Have Not Faced Up to the Real Question

The appellees-respondents have not faced up to the above question. They apparently ignore the fact that the tax is on a business privilege enjoyed exclusively within the city of Mobile where the sales are made, where the gas is delivered to the consumers, and where a local business office is maintained and the purchase price billed and collected.

We submit that the same error inheres in the decision of the Court of Appeals. In denying the second petition for rehearing that Court summarized its views as follows:

> "We held that delivery of the gas directly to industrial consumers in the City of Mobile is an integral

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[2] *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n*, 332 U.S. 507 (1947).

part of its movement in interstate commerce, and that a tax on the privilege of making such deliveries is a burden on interstate commerce."

Obviously, the Court of Appeals and the appellees-respondents (a) erroneously described the tax as one on the privilege of making interstate deliveries, despite the clear language of the ordinance taxing only the privilege of engaging *within the City of Mobile* "*in the business of selling* or distributing natural gas", and (b) in consequence mistakenly rely on cases where the tax was on the act of interstate transportation or an act directly connected with the interstate flow of commerce[3] and disregard those cases where the tax was, as here, conditioned upon a local activity.[4] Also disregarded is the basic statutory authority upon which the local tax rests. The Alabama statute limits the tax in the case of interstate business to only that portion "within the limits of the state, and where such person, firm or corporation has an office or transacts business in the city or town". Title 37, Section 735, Code of Alabama 1958.

We submit that the Court of Appeals should be reversed and the decision of the District Court reinstated (1) on authority of the decisions of this Court in pipe line cases, and (2) on authority of other decisions of

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[3] *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954).

[4] *East Ohio Gas Co. v. Tax Comm'n*, 283 U.S. 465 (1931); *Southern Natural Gas Corp. v. Alabama*, 301 U.S. 148 (1937); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U.S. 70 (1940); *International Harvester Co. v. Dep't of Treasury*, 322 U.S. 340 (1944); *Field Enterprises, Inc. v. Washington*, 47 Wash. 2d 852, 289 P.2d 1010, aff'd. 352 U.S. 806 (1956); *Norton Co. v. Dep't of Revenue*, 340 U.S. 534 (1951); *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948).

this Court upholding the right of a state to tax the consummation within its borders of interstate transactions where it treats wholly local transactions the same way. We will briefly summarize these two classes of cases as they relate to the precise question of the taxability of the local event, the consummation of the transaction within the taxing state.

The Pipe Line Cases

This Court has announced in clear language that the direct sale to the consumer by an interstate pipe line company is subject to state taxation:

> "This Court has often had occasion to rule that the retail sale of gas at the burner tips by one *who pipes the gas into the state*, or by a local distributor acquiring the gas from another who has similarly brought it into the state, is subject to *state taxation* and regulation. *Public Utilities Comm'n*, 283 U.S. 465; *Southern Gas Corp.* v. *Alabama*, 301 U.S. 148, 154; cf. *Missouri* v. *Kansas Gas Co.* 265 U.S. 298, 309; *Illinois Natural Gas Co.* v. *Central Public Service Co.* 314 U.S. 498." (Emphasis supplied)
>
> Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 653 (1942).

In *Southern Natural Gas Corp.* v. *Alabama*, 301 U.S. 148 (1937), this court upheld a franchise tax upon a pipe line company for the privilege of doing business in Alabama. The parallel between that case and our case is striking. Southern's business within the state, on which the tax was predicated, consisted of the supplying of gas for consumption to several steel and industrial plants of Tennessee Coal, Iron & Railroad Com-

pany and its affiliates. (Here United supplies seven different industrial plants scattered in the Mobile area.) Southern was required to provide the service lines to the plant sites and metering stations there. (United contracts require the same of it.) A specific reduced delivery pressure was required of Southern. (Similar requirements are imposed on United.) The measuring equipment installed at the plant sites by Southern was to remain its property. (United's contracts contain the same provision.) Southern, although a Delaware corporation, maintained its principal office in Birmingham where the orders were received and serviced and bills rendered. (Although United's principal office is not in Alabama, it maintains a business office in Mobile from which it services these industrial consumers, supervises the deliveries to them, bills for the gas consumed and collects the purchase price. Hence, United also has a business and taxable situs in Mobile.) In upholding the Alabama franchise tax on Southern this Court said:

> "We had occasion in *East Ohio Gas Co.* v. *Tax Commission*, 283 U.S. 465, 470, to consider the distinction between the transportation of gas into a State and the furnishing of the gas so transported to consumers within the State.
>
> * * * * * * *
>
> "The Court quoted with approval the statement in *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298, 309, that 'The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution plants directly from interstate mains; and this is so whether the local distribution be

made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance.'" 301 U.S. at 154.

The Court below and the appellees-respondents would invalidate this tax on authority of *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954). That case is readily distinguishable for there the tax was in fact levied on the very flow of commerce. While the tax purported to be levied on the privilege of "gathering gas" this Court pointed out that the activity of the appellants there did not fall "within the meaning of that term and its ordinary usage; but the tax statute gives the term a transcendant scope." 347 U.S. at 161. The incidence of the tax was on the "taking" of the gas into the transmission lines of the pipe line company "after the gas had been produced, gathered and processed by others than appellants. The 'taking' into appellants' pipe lines is solely for interstate transmission and the gas at that time is not only actually committed to but is moving in interstate commerce." *Id.* at 167. The Court further said that "in reality the tax is, therefore, on the exit of the gas from the state." *Ibid.*

It has been repeatedly recognized in cases dealing with regulation that direct sales to industrial consumers constitute sufficient local activity to be subject to state regulation without creating an undue burden on commerce. The appellees-respondents brush aside these cases with the statement that they deal with regulation, not taxation. These decisions are nevertheless very much in point on the precise question of whether the consummation of sales direct to the con-

sumer is a local activity for, if it is, it then becomes subject to state taxation under the controlling decisions of this Court.[3]

As early as *Pennsylvania Gas Co. v. Public Service Comm'n*, 252 U.S. 23 (1920), the Court upheld state regulation of direct sales to consumers because "the thing which the state commission has undertaken to regulate, while part of an interstate transmission, *is local in its nature* * * *." (Emphasis supplied) Likewise, in *U.S. v. Public Utilities Comm'n*, 345 U.S. 295 (1953), dealing with electric power, the Court reaffirmed "that sales across the state line direct to consumers *is a local matter* within the authority of the agency of the importing state." 345 U.S. at 303. (Emphasis supplied)

Again in *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329, 333 (1951), the Court said:

> "but the sale and distribution of gas to local consumers, made by one engaged in interstate commerce is *'essentially local' in aspect* and is subject to state regulation without infringement of the commerce clause of the Federal Constitution." (Emphasis supplied)

That this Court regards an activity that is local for purposes of regulation as being also a *taxable* local activity is evidenced by a footnote to its opinion in the

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[3] Both Scott and Ideal admit that these sales are subject to local regulation. Ideal at page 15 of its motion to dismiss says: "Appellee readily admits that direct sales in interstate commerce of natural gas to industrial consumers is subject to local regulation." They fail to demonstrate either by logic or authority how a local activity for regulatory purposes ceases to be a local activity for tax purposes.

first *Panhandle* case where the following is quoted with approval:

> "... [T]he Supreme Court from the beginning allowed the state both *to tax* and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if this first sale is also necessarily the last sale because consummated by consumption. Powell, Note, 58 Harv. L. Rev. 1072, 1082." (Emphasis added)
>
> *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n*, 332 U.S. 507, 517, n. 12 (1947).

We submit that it is important to set aright the error of the Court of Appeals which, contrary to both the tax and the regulation cases decided by this Court, holds that direct sales to industrial consumers are "inseparable from interstate commerce, and not merely 'a local incident' of such commerce" and again that the sale and delivery of the gas within the City of Mobile "is an integral part of its movement in interstate commerce", and hence may not be locally taxed. (Quoted from opinion of October 5, 1960, on first petition for rehearing, 282 F.2d 574, 580.)

Other Cases Sustaining Tax on Consummation of a Transaction Within a State

There is now quite a line of cases dealing with sales of commodities other than gas in which this Court has held that a state may properly tax sales, or the privilege of making sales, or gross income from sales, although made by an out-of-state seller, where the transaction is consummated within the taxing state. A brief look at some of these should be sufficient.

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940), involved a sales tax on coal delivered on barges direct to the consumer from out of the state. The tax was held not to violate the commerce clause despite the interstate movement of the coal because the taxable event was "a local activity, delivery of goods within the state upon their purchase for consumption." 309 U.S. at 58.

International Harvester Co. v. *Dep't of Treasury*, 322 U.S. 340 (1944), involved a privilege tax upon the receipt of gross income as applied to an out-of-state seller. The Court relied on *Berwind-White* and, while recognizing that in the former case the tax was on the buyer but here it was on the seller, said "but in each a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce." (322 U.S. at 346) and that "such 'local activities or privileges' * * * are as adequate to support this tax as they would be to support a sales tax." *Id.* at 349.

In *Field Enterprises, Inc.* v. *Washington*, 352 U.S. 806 (1956), this Court affirmed without opinion decisions of Washington state courts (289 P.2d 1010, 1012) holding Field's book sale business to be subject to the state "business and occupation tax" measured by gross receipts. Although orders for books were subject to out-of-state acceptance and were shipped from the out-of-state plant direct to the purchasers, the activities of salesmen and other representatives at a divisional office (where samples were maintained and orders received for forwarding to the out-of-state head office) were held to be sufficient local activities to sustain the occupation tax.

In *Norton Co.* v. *Dep't of Revenue*, 340 U.S. 534 (1951), the Court upheld an Illinois occupation tax

on "the business of selling tangible personal property at retail in this state", measured by gross receipts, as applied to all sales made in Illinois by a Massachusetts corporation except orders that customers sent direct to the Massachusetts office which were filled by direct shipments back to the customers. Held subject to the Illinois tax were (1) sales on orders received or serviced by a local branch office even though the orders were forwarded to Massachusetts for acceptance and shipment from there to the customers, and (2) sales on orders from Illinois residents direct to Massachusetts but shipped to the Chicago branch for delivery by it. All orders forwarded from or in any manner serviced by the Illinois branch office were thus held subject to the tax. Servicing by the Illinois branch was not nearly as extensive as that performed by United from its agency in Mobile. This Court said:

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. *Unless some local incident occurs* sufficient to bring the transaction within its taxing power, the vendor is not taxable."
>
> 340 U.S. at 537 (Emphasis supplied).

> "Although the concern does not, by engaging in business within the state, lose its right to do interstate business with tax immunity, *Cooney v. Mountain States Telegraph Co.*, 294 U.S. 384, *it cannot channel business through a local outlet to*

gain the advantage of a local business and also hold the immunities of an interstate business."

Id. at 539 (Emphasis supplied).

The Supreme Court of Alabama recently sustained a license tax on an out-of-state contractor for maintenance dredging of a navigation channel in Mobile Bay against the contention that the tax was a direct burden on interstate commerce. The contractor argued that the mechanical phase of the job (dredging) could not realistically be separated from the engineering and administrative phases (which were performed in its New Orleans office) and that the tax was exacted against the total contract price without any apportionment. In a decision that this Court declined to review, the Alabama Supreme Court said:

> "It seems to us that the local activity of performing the contract in Alabama can realistically be separated from the interstate process or flow of commerce (assuming that Standard's overall activities here involved constituted interstate commerce). The tax incidence is the performance of the contract in the State. It is not laid upon any other phase of Standard's activities. It is applicable alike to resident and nonresident contractors. There is no discrimination whatever against nonresidents. The performance of the contract admittedly was wholly within Alabama territory, without any possibility of any other state imposing a tax on such performance. We fail to see any unconstitutional burden or discrimination in the application of the license in this case. *See Western Live Stock v. Bureau of Revenue, supra; McGoldrick v. Berwind-White Coal Mining Co.*, 309

U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876; *Caskey Baking Co. v. Commonwealth of Virginia*, 313 U.S. 117, 61 S.Ct. 881, 85 L.Ed. 1223."

Standard Dredging Corp. v. Alabama, 122 So. 2d 280, 286 (Ala. 1960), appeal dismissed, 364 U.S. 309 (1960).

Other state supreme courts have relied on the decisions of this Court discussed above to support local taxation of activities within the taxing state in consummation of interstate transactions. Real confusion in this area of taxation will ensue in both the federal and state courts if the decision of the Court of Appeals here is not reviewed and corrected.[6]

Perhaps the preeminent text in the field of state taxation of interstate commerce is the book on that subject by Paul J. Hartman (Dennis & Co., Inc., 1953). This Court has several times cited Hartman with approval. We submit that his analysis of the right of states to exact a privilege tax measured by gross receipts under the decisions of this Court through the year 1945 has been confirmed by the subsequent decisions. He said:

"Beginning with the epochal *Western Live Stock* [v. *Bureau of Revenue*, 303 U.S. 250 (1938)] de-

[6] The following are illustrative of state court decisions now cast in doubt by the Court of Appeals decision here: *Armstrong v. City of Tampa*, 118 So. 2d 195 (Fla. 1960); *Berkshire Fine Spinning Associates, Inc. v. City of New York*, 5 N.Y.2d 347, 157 N.E.2d 614, appeal dismissed, 361 U.S. 3 (1959); *Keystone Metal Co. v. City of Pittsburgh*, 374 Pa. 323, 97 A.2d 797, cert. denied, 346 U.S. 887 (1953); *Texas Gas Transmission Corp. v. Atkins*, 327 S.W.2d 305 (Tenn. 1959); *Standard Dredging Co. v. Alabama*, 122 So. 2d 280 (Ala. 1960), appeal dismissed, 364 U.S. 309 (1960).

cision, the Court had increasingly emphasized the consequences and effects, either actual or threatened, of the questioned tax to hamper or hinder interstate operations. In answering the constitutional question, the dominant concern of the Court was with whether the tax would place interstate commerce at a competitive disadvantage with local business. Moreover, during the years following *Western Live Stock* the Court had obliterated the pointless and mechanical distinction between a tax levied 'on' gross receipts and taxes imposed on some other subject and 'measured' by gross receipts. The exaction would be sustained if the proceeds taxed, whether from sales transactions or from services, were fairly attributable to activities and events having a substantial connection with the taxing State. That was true whether the subject of the tax was a local privilege measured by gross receipts, or whether the tax was laid directly on gross receipts as the subject of the tax. Whatever the subject of the tax, it would be nullified however, if it threatened to result in a heavier tax burden on interstate than on local business. The emphasis and stress upon formulas and labels were greatly reduced. A pragmatic approach to the problem had been adopted and interstate commerce paid its way."

Hartman, State Taxation of Interstate Commerce, 199 (1953).

Discrimination in Reverse

We have emphasized that there is no claim the tax here is discriminatory against interstate commerce, or unfairly apportioned, or unreasonable in amount, or

beyond the charter power of the City of Mobile. The tax applies alike to the local distributor as well as United. The result of the Court of Appeals decision, however, is to discriminate *in favor of* the interstate seller. Just how unfair and unjust this discrimination is, and can become, is demonstrated by the record. Prior to November 1, 1954, nine industries (including the two appellees-respondents) were purchasing their gas from the local distributor, Mobile Gas Service Corporation. All nine of these industrial gas sales contracts were then assigned to United (Ideal R 62; Scott R 57). Seven of these industries were then located in the Mobile taxing jurisdiction (and two in nearby municipalities). Eight of the nine are now within the Mobile tax jurisdiction. However, had they continued to purchase their gas from the Service Corporation, the local distributor, there would be no question of the application of the Mobile tax to such sales.[7] After the assignment of these contracts to United for direct sales to the industries the gas continued to reach each industrial plant through the same mains and pipes, serviced by the same crews, measured through the same meters, and billed and paid for through the same office in the city of Mobile as before. The Service Corporation continued to render every service and function in connection with the sales it had rendered previously. It simply changed from the position of seller to that of agent for United, the new seller. United had removed the "middle man" but retained its services as its agent.

[7] Even the Court of Appeals so recognized in its opinion denying the second petition for rehearing and upholds this very tax as "to the gross receipts of the local distributor, Mobile Gas Service Corporation."

These seven industrial customers under the Court of Appeals decision will enjoy an advantage over other gas users in Mobile, all of whom will become victims of discrimination in reverse. It requires little imagination to picture the evasion of municipal and state privilege taxes that now can be accomplished with the approval of the Court of Appeals. Additional large consumers in the Mobile area might well seek to make this "paper shift" by which their gas requirements would continue to be delivered and serviced by the Service Corporation just as before but in the new capacity of agent for United rather than the direct seller. It should be borne in mind that United is the source of all gas that the Service Corporation distributes in Mobile so even the source would remain the same. In many other municipalities as well, and in states having comparable license or privilege taxes, the local distributor and the interstate pipe line company can offer to the large gas consumer a new and attractive arrangement with substantial tax savings (perhaps with a split among them of the tax saved), but the smaller local consumer whose volume is not attractive to the interstate pipe line will be the victim of a discrimination that we submit is not constitutionally sustainable.*

Anticipated Summary Enforcement

The obvious and only purpose of the ordinance before the Court is to raise revenue. The Court of Ap-

* If the decision is sustained this discrimination *in favor of* the interstate seller, and the resulting loss of revenue by the local government under whose protection the business is conducted, will not be limited to sales of natural gas. The same discrimination may arise immediately in interstate sales of electric power to consumers within the area comprising the Fifth Court of Appeals circuit and could well spread to many other interstate sales.

peals anticipates the possible resort to injunctive or criminal procedures to cut off sales in order to compel payment without the slightest suggestion in the case of any threat or intention on the part of local authorities to employ such remedies even if available. A judgment based on anticipated state action is not countenanced by this Court.[9]

Moreover, the validity of the tax is not dependent upon the validity of the feared injunctive or criminal procedures. The ordinance contains a separability clause. The tax liability may be enforced by an action as for a debt. Appropriate protection from any invalid collection procedure, should the city ever resort thereto, is afforded through judicial review. *Public Service Comm.* v. *Wycoff Co.*, 344 U.S. 237, 247-248.

The Question Merits Review

The important question of the taxability of direct sales of gas to consumers is presently shadowed with doubt, not only by the decision of the Court of Appeals but by two conflicting state court decisions. Appellees-Respondents frequently cite and quote from *Mississippi Fuel Corp.* v. *Hoffman*, 4 Ill. 2d 468, 123 N.E.2d 503 (Ill. 1954), cert. denied, 349 U.S. 935 (1955). This Illinois decision not only runs contra to the decisions of this court but finds its own indictment in the strong dissenting opinion. Yet it has not been overturned. The Supreme Court of Tennessee subsequently reached the opposite and, we submit, correct result in *Texas Gas Transmission Corp.* v. *Atkins*, 327 S.W.2d 305 (1959). In dealing with "local activities"

[9] *Public Service Comm.* v. *Wycoff Co.*, 344 U.S. 237, 247 (1952); *Utah Power and Light Co.* v. *Pfost*, 286 U.S. 165, 187; *St. Louis S.W.R. Co.* v. *Arkansas*, 235 U.S. 351.

other than sales the Tennessee opinion declares the fact "that Texas is engaged solely in interstate commerce is not determinative" (327 S.W.2d at 307), holds that as to interstate commerce "local incidents may be a sound basis for taxation where they can be sufficiently separated from interstate commerce" (*ibid.*), and found that the Tennessee annual privilege and excise taxes are not direct taxes on interstate commerce, and are not discriminatory and cannot result in multiple taxation.

This Court recognizes the capacity and propriety of state courts deciding federal constitutional questions,[10] and affords uniformity of decision by Supreme Court review.

> ". . . a construction given by any court, whether it be Federal or state, may ultimately be reviewed by this Court . . . and thereby uniformity in construction may be secured."
>
> *Great Northern Ry Co. v. Merchants Elevator Co.* 259 U.S. 285, 290-291.

The fact that a conflict between state courts exists on so important a question under the commerce clause, coupled with the conflict the Court of Appeals has here created with decisions of this Court in this important area of taxation, demonstrates that the validity *vel non* of this type of tax is not academic or episodic, that the issue involved is of constitutional dimensions, and that the question presented is one so substantial as to require plenary consideration.

[10] *Pratt v. Paris Gaslight & Coke Co.* 168 U.S. 255 (1897); *New Marshall Engine Co. v. Marshall Engine Co.* 223 U.S. 473 (1912); *State of Arkansas v. Kansas & Texas Coal Co.* 183 U.S. 185 (1901).

CONCLUSION

The sharp conflict created by the Court of Appeals with decisions of this Court in the area of local taxation of interstate sales consummated within the taxing state, as well as the conflicting decisions of two state Supreme Courts, should be settled and eliminated by this Court. The obvious error of the Court of Appeals in treating a tax on the local business of selling natural gas to the ultimate consumer as if it were a tax on the preceding interstate transportation, in order to condemn it as a tax directly on the flow of commerce, should be remedied. States and municipalities should be permitted to receive just recompense for the protection and benefits afforded the seller who consummates his sales within the local taxing jurisdiction, especially when so many varied local activities are present, as in this case.

We urge that jurisdiction be accepted either by appeal or certiorari.

Respectfully submitted.

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